SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

DOCKET NO.

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Petitioner,

vs.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,

Respondents.

PETITION AND APPENDIX FOR CERTIORARI TO REVIEW, BEFORE JUDGMENT, A CASE PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY PRO SE
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

ALFRED J. LUCIANI
Deputy Attorney General
Division of Criminal Justice
Appellate Section
7 Glenwood Avenue
East Orange, New Jersey 07017

Of Counsel and on the Petition

LOIS A. De JULIO
Legal Assistant
On the Petition

LEGAL MIMEOGRAPHING SERVICE, INC.
561 Broad St., Newark, N. J. (201) 643-4292

Clerk of the Supreme Court of the United States
Washington, D. C.

re: GEORGE F. KUGLER, etc. v. Y.W.C.A. et als.

ERRATA

Dear Sir:

In printing the Petition on behalf of Kugler in the above captioned case, a line has been omitted. On Page 16, Line 16, the Petition now reads:

. . . judicial delineation of the bounds of a statutory proscription may be . . .

The Brief should read as follows:

. . . judicial interpretation rather than legislative mandate. And judicial delineation of the bounds of a statutory proscription may be . . .

We would greatly appreciate your noting the correction. We extend our apologies and regrets for any inconveniences suffered.

LEGAL MIMEOGRAPHING SERVICE
Appellate Printers

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
ARGUMENT	
POINT I THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER SINCE THE FEDERAL PLAINTIFFS FAILED TO PRESENT A CASE OR CONTROVERSY CAPABLE OF JUDICIAL RESOLUTION AND WERE WITHOUT STANDING TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF NEW JERSEY'S ABORTION STATUTE	
POINT II AS A GESTURE OF COMITY, THE THREE-JUDGE COURT SHOULD HAVE ABSTAINED FROM CONSIDERING THE MERITS OF THIS ACTION DURING THE PENDENCY OF STATE COURT ADJUDICATION OF THE CONSTITUTIONALITY OF N.J.S. 2A:87-1	
POINT III UNDER THE CONCEPT OF EQUITABLE ABSTENTION, THE COURT BELOW SHOULD HAVE DECLINED TO EXERCISE JURISDICTION	
CONCLUSION	22

CASES CITED

	PAGE
American Trial Lawyers Association, New Jersey Branch, et al. v. New Jersey Supreme Court, 409 U.S. — (No. 72–691, decided January 15, 1973)	15
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	8
Becker v. Thompson, 459 F.2d 919 (5 Cir. 1972), reh. den. 463 F.2d 1338 (1972)	19
Boyle v. Landry, 401 U.S. 77 (1971)	9,18,20
Cameron v. Johnson, 390 U.S. 611 (1968)	9
Carter v. City of Fort Worth, 456 F.2d 572 (5 Cir. 1972)	9
Cheany v. Indiana, 410 U.S. 991, 93 S. Ct. 1516, decided March 19, 1973	14
City of Greenwood v. Peacock, 394 U.S. 808, 828 (1960)	20
Cole v. Richardson, 405 U.S. 676 (1972)	11
Commonwealth of Massachusetts v. Mellon, 262 U.S. 447 (1923)	8
Cooley v. Endictor, 340 F. Supp. 15 (N.D. Ga. 1971), aff'd 458 F. 2d 513 (5 Cir. 1972), cert. den. 409 U.S. 1115 (1973)	19
Demby vl Wexler, 436 F.2d 570 (5 Cir. 1970)	9
Doe v. Bolton, 410 U.S. 179 (1973)	3,6,13,20
Doe v. Woodahl, 492 S.W. 2d 888 (Ark. Sup. Ct 1973)	14
Ehlert v. United States, 402 U.S. 99 (1971)	11
Embry v. Allen, 401 U.S. 489 (1971)	19
Epperson v. Arkansas, 393 U.S. 97 (1968)	9
Fairchild v. Hughes, 258 U.S. 126 (1922)	8
Federation of Labor v. Mc Adory, 325 U.S. 450, 461 (1944)	8
Fenner v. Boykin, 271 U.S. 240 (1926)	21
Flast v. Cohen, 392 U.S. 83, 95–98 (1968)	8

	PAGE
Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 498 (1949)	10
Gleitman v. Cosgrove, 49 N.J. 22, 53 A.2d 689, 706 (1967)	10,14,16
Golden v. Zwickler, 394 U.S. 103 (1969)	10
Grayned v. City of Rockford, 405 U.S. 104 (1972)	11
Gunn v. University Committee to End War in Vietnam, 399 U.S. 383 (1970)	5
Independent Tape Merchant's Ass'n v. Creamer, 346 F. Supp. 456 (M.D. Pa. 1972)	21
Jones v. Wade, — F. 2d —13 Cr. L. Rptr. 2262, 2263 (1973)	19
Laird v. Tatum, 408 U.S. 1 (1972)	9
Lake Carriers v. Mac Mullen, 406 U.S. 498 (1972)	10,19,20
Lewis v. Kugler, 446 F. 2d 1343 (3 Cir. 1971)	20
May v. State, 492 S.W. 2d 888 (Ark. Sup. Ct. 1973)	14
Mitchell v. Donovan, 398 U.S. 427 (1970)	5
Muskrat v. United States, 219 U.S. 346 (1911)	8
People v. Frey, 294 N.E. 2d 257, 13 Cr. L. Rptr. 2111 (Ill. Sup. Ct. 1973)	14
Perez v. Ledesma, 401 U.S. 82 (1971)	20
Poe v. Ullman, 367 U.S. 497, 504 (1961)	9,10,11
Police Department of Chicago v. Mosely, 408 U.S. 92 (1972)	9
Public Service Commission v. Brashear Freight Lines, 306 U.S. 204 (1939)	5
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)	15
Roe v. Wade, 409 U.S. 113 (1973)	2, passim
Ryan v. Spector, 332 F. Supp. 26 (E.D. Pa. 1971)	19
Samuels v. Mackell, 401 U.S. 66 (1971)	4,17
Sanitary Vendors, Inc. v. Byrne, 72 N.J. Super. 276, 287, 178 A. 2d 259 (LawDiv. 1962), aff'd 40 N.J. 157 (1963)	10

PAGE

Sasaki v. Commonwealth, 13 Crim. L. Rptr. 2253 (Ky. Ct. App. 1973) 14

Schmoll v. Creecy, 54 N.J. 194, 202, 254 A. 2d 525 (1969) 15

State v. Brandenburg, 137 N.J.L. 124, 58 A. 2d 709 (Sup. Ct. 1948) 16

State v. Coleman, 46 N.J. 16, 214 A. 2d 393 (1965), cert. den. 383 U.S. 950 (1966) 16,21

State v. Ellich, 10 N.J. 146, 89 A. 2d 685 (1952) 10

State v. Haren, et al., 124 N.J. Super. 475, 307 A. 2d 644 (Law Div. 1973) 11,12,16

State v. Hudson County News Co., 41 N.J. 247, 265 196 A. 2d 225 (1963) 15

State v. Hultgren, 204 N.W. 2d 197, 12 Cr. L. Rptr. 2426 (Minn. Sup. Ct. 1973) 14

State v. Moretti, 52 N.J. 182, 244 A. 2d 499, cert. den. 393 U.S. 952 (1968) 14

State v. Munson, 13 Cr. L. Rptr. 2166 (S.D. Sup. Ct. 1973) 14

State v. Murphy, 27 N.J.L. 112, 114-115 (Sup. Ct. 1858) 15

State v. Norflett, Monmouth County Indictment No. 657-72 12

State v. Rosenfled, 62 N.J. 594, 601-602, 303 A. 2d 889 (1973) 13,16

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 9

United States v. Fruehauf, 365 U.S. 146, 157 (1961) ... 8

United States v. Petrillo, 332 U.S. 1, 7 (1947) 12

United States v. National Dairy Corp., 372 U.S. 29, 36 (1963) 12

United States v. Raines, 362 U.S. 17, 21 (1960) 12

United States v. Vuitch, 402 U.S. 62 (1971) 5

Younger v. Harris, 401 U.S. 37 (1971) 3,4,9,17

CONTENTS OF APPENDIX

	PAGE
Opinion of the United States District Court	1a
Notice of Appeal by Attomey General of New Jersey to the United States Court of Appeals for the Third Circuit, Dated: April 13, 1972	62a
News Release of Office of the Attorney General of New Jersey, Dated: January 31, 1973	64a
Order Vacating Judgment of United States District Court for the District of New Jersey, Dated: March 2, 1973	67a
Order Embodying Judgment of Three-Judge District Court re Y.W.C.A. et als. v. Kugler	69a
Opinion and Order of the United States District Court for the District of New Jersey, Filed: July 27, 1973	72a
Notice of Appel to the Supreme Court of the United	
Notice of Appeal to the Supreme Court of the United States	75a
Notice of Appeal to the United States Court of Appeals for the Third Circuit, Dated: August 20, 1973	76a

UNITED STATES CONSTITUTION CITED

Article III, Section 2	8
Amendment I	2
Amendment XIV	2

UNITED STATES CODES CITED

28 U.S.C.A. 1253	2
28 U.S.C.A. 1254(1)	2
28 U.S.C.A. 2284	4

PAGE

SUPREME COURT RULE CITED

S.C.R. 20 3

NEW JERSEY STATUTES CITED

N.J.S.A. 2A:87 – 1 . . . . . 1, passim

N.J.S.A. 46:9 – 16 4

N.J.S.A. 52:17B – 19 11

N.J.S.A. 52:17B – 98 11

N.J.S.A. 52:17B – 101 11

N.J.S.A. 52:17B – 103 11

N.J.S.A. 52:17B – 106 11

N.J.S.A. 52:17B – 107 11

OTHER SOURCES CITED

3 H. Johnston, Correspondence and Public Papers of John Jay, 486 – 489 (1891) 8

Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Colum.L. Rev. 874, 890-91 (1972) 19

Wisconsin Attorney General's Remarks, 13 Cr. L. Rptr. 2063 14

C. Wright, Federal Courts 34 (2d ed. 1963) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

DOCKET NO.

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Petitioner,

vs.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, et als,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the three-judge court for the District of New Jersey is reported at 342 *F.Supp.* 1048 and is reproduced in the annexed appendix at 1 A to 58 A. The opinion of the United States Court of Appeals for the Third Circuit disposing of petitioner's motion for a stay of judgment is reported at 463 *F.2d* 203. The order of the United States Court of Appeals for the Third Circuit vacating and remanding the judgment of the three-judge court is reproduced in the annexed Appendix at 67 A to 68 A. The Opinion and Order of the three-judge court on remand is reproduced in the annexed Appendix at 72 A to 74 A.

JURISDICTIONAL STATEMENT

Petitioner, George F. Kugler, Jr., Attorney General of New Jersey, respectfully prays that a writ of certiorari issue to review the judgment of a three-judge district court for the District of New Jersey declaring the New Jersey abortion statute *(N.J.S.A.* 2A:87-1) void on its face and therefore unconstitutional. (1A). The district court's judgment was entered on July 27, 1973. (72A). By Notice of Appeal dated August 20, 1973, petitioner herein appealed to the United States Court of Appeals for the Third Circuit. (76A).

As the three-judge court denied injunctive relief, the federal plaintiffs appealed directly to this Court pursuant to 28 *U.S.C.A.* §1253. That Notice of Appeal was filed on September 26, 1973. (75A).

Pursuant to this Court's recommendation in *Roe v. Wade*, 409 *U.S. 113 (1973), S.C.R.* 20 and 28 *U.S.C.A.* § 1254(1), petitioner prays that writ of certiorari issue so that his claims may be properly presented to this Court.

The decision and order of the three-judge district court for the District of New Jersey was filed on July 27, 1973, which judgment, in effect, reaffirmed that court's earlier decision in the same case *(Y.M.C.A., et al. v. Kugler,* 342 *F.Supp.* 1048 (D.N.J.)) which was vacated and remanded by order of the United States Court of Appeals by the Third Circuit (75A). The jurisdiction of this Court is invoked under 28 *U.S.C.A.* § 2254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law . . . abriding the freedom of speech . . ."

U.S. Const., Amend. XIV:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

N.J.S.A. 2A:87-1

> "Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses

any instrument or means whatever, is guilty of a high misdemeanor.

If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both."

Supreme Court Rule 20

"A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate process and to require immediate settlement in ths court."

QUESTIONS PRESENTED

I. Did not the court below lack jurisdiction to decide the merits because of federal plaintiff's failure to present a case or controversy?

II. Should not the three-judge court have abstained from considering the merits of this action until the New Jersey courts had the opportunity to construe *N.J.S.A.* 2A:87-1 in light of this Court's landmark decisions in *Roe v. Wade*, 410 *U.S.* 113 (1973) and *Doe v. Bolton*, 410 *U.S.* 179 (1973)?

III. Should not the three-judge court have declined to exercise its jurisdiction under the concept of equitable abstention under the rationale of *Younger v. Harris*, 401 *U.S.* 37 (1971)?

STATEMENT OF THE CASE

The complaint in *Y.W.C.A., et al. v. Kugler,* District Court Docket, Civil No. 264-70, was filed on March 5, 1970.

On June 1, 1970, federal plaintiffs requested the convening of a three-judge court pursuant to 28 *U.S.C.A.* § 2284 to consider the constitutionality of the New Jersey Abortion statute, *N.J.S.A.* 2A:87-1, and the medical licensing statute as it relates to abortion, *N.J.S.A.* 46:9-16. Pursuant to a recommendation by George H. Barlow, U.S.D.J., a three-judge district court was convened. (4A).

On February 29, 1972, that court, one judge dissenting, granted plaintiff-physicians' motion for summary judgment in an opinion declaring the New Jersey abortion statute unconstitutional. The federal plaintiffs included nine medical doctors, two women's organizations, and several individual women. The court found that the plaintiff-physicians had standing because the statutes infringed on their right to practice medicine according to the highest medical standards. The court also found that these physicians had standing to litigate the rights of their women patients. The complaint was dismissed as to the others for lacking of standing. (10A).

In rejecting petitioner's recommendation of abstention, the court concluded that the rationale of *Younger v. Harris,* 401 *U.S.* 37 (1971), and *Samuels v. Mackell,* 401 *U.S.* 66 (1971), did not apply to declaratory relief when a state prosecution is not pending. However, injunctive relief was denied because the court found that the "special circumstances" necessary to justify such extraordinary relief were not present. (15A).

As is pertinent to this application, the majority concluded that the New Jersey abortion statute *(N.J.S.A.* 2A:87-1) was unconstitutionally vague on its face and as applied; that it chill (ed) and deter (red) the plaaintiff-physicians in the exercise of protected First Amendment activities; "and that it violate (d) plaintiff-physicians' rights under the Fourteenth Amendment to freely practice the profession of their choice." (22A). The court concluded that neither legislative history nor judicial interpretation had established a sufficiently definite meaning for the phrase "without lawful justification." (21A).

The majority further found that the New Jersey statute unconstitutionally invaded plaintiff-physicians' and their women

patients' right of privacy in the physician-patient relationship. Additionally, the majority voided *N.J.S.A.* 45:9-16, providing for the suspension or revocation of a medical license, as that statute related to abortion.

The majority also held that *N.J.S.A.* 2A:87-1 and *N.J.S.A.* 45:9-16 violated the plaintiff-physicians' and their women patients' right to privacy in the physician-patient relationship. This conclusion was based on the court's opinion that a woman has a constitutional right to terminate her pregnancy during its early stages. The court added that interference with this right can only be justified by a specific and compelling state insterest, which the majority did not find to exist. Although the majority granted declaratory relief, injunctive relief was withheld.

The dissenting judge concurred in the opinion of the majority only insofar as the issues of standing and abstention were concerned. As to the vagueness issue, the judge concluded that he was bound by the Supreme Court's ruling in *United States v. Vuitch*, 402 *U.S.*62 (1971), and therefore would have upheld the constitutionality of *N.J.S.A.* 2A:87-1 on that basis. Moreover, although recognizing that the basic right to privacy in the woman would include the right to abortion, he would have further held that the State had a compelling interest in protecting prenatal life at all stages of gestation. (56A).

An order embodying the judgment of the court and denying petitioner's motion for a stay of judgment was entered on April 12, 1972. Petitioner herein filed simultaneous notices of appeal to the Court of Appeals and to the United States Supreme Court on April 19, 1972. The notice of appeal to the United States Supreme Court was voluntarily withdrawn on the basis of *Gunn v. University Committee to End War in Vietnam*, 399 *U.S.* 383 (1970), *Mitchell v. Donovan*, 398 *U.S.* 427 (1970); and *Public Service Commission v. Brashear Freight Lines*, 306 *U.S.* 204 (1939). Those federal plaintiffs who obtained declaratory relief did not appeal from the denial of injunctive relief.

Petitioner moved before the Court of Appeals, by notice of motion dated May 11, 1972, for a stay of the judgment of the three-judge district court. The motion was submitted on June 5, 1972, without argument before Judges Gibbons and Rosenn. On June 14, 1972, the Third Circuit denied petitioner's application for a stay of judgment. *Y.W.C.A. et al v. Kugler*, 463 *F.2d* 203 (3rd Cir. 1972).

During the pendency of the plenary appeal in the Third Circuit, the United States Supreme Court handed down the landmark abortion decisions, *Roe v. Wade*, 410 *U.S.* 113 (1973), and *Doe v. Bolton*, 410 *U.S.* 179 (1973).

By order dated March 2, 1973, after oral statements had been presented by counsel, the cause was remanded:

> "After consideration of the contentions presented by appellants, and the recent decisions of *Roe v. Wade*, — *U.S.* —, and *Doe v. Bolton*, — *U.S.* — (January 22, 1973), it is:
>
> ORDERED AND ADJUDGED that the judgment of the district court is vacated and the proceedings remanded for reconsideration of the cause, including the issue of standing, and, if reached, the substantive holding, and any implementing relief."

On remand, the three-judge court refiled its original opinion on July 27, 1973, stating:

> "From our reconsideration and review we are satisfied that no modification, amendment or implementation or our opinion or order herein is either appropriate or required." (74A).

The federal plaintiffs filed a Notice of Appeal to this court from the denial of their application for an injunction. (75A). Pursuant to this Court's advisement in *Roe v. Wade*, *Supra*, petitioner applies for a writ of certiorari prior to judgment in the United States Court of Appeals for the Third Circuit.

In 1967, guidelines for prosecutions under *N.J.S.A.* 2A:87-1, the New Jersey criminal abortion statute, were promulgated. Since that time, to the knowledge of petitioner and on the basis of a survey of the local prosecutors, no doctor has been prosecuted for the performance of an abortion.[1] Admittedly, the 1967 guidelines, promulgated by the county prosecutors and the then Attorney General, did not, in theory, anticipate the full breadth of the abortion decisions in *Roe* and *Doe*. However, neither the practice of duly licensed physicians nor their relationship with their

---

[1] Dr. Sherwin H. Raymond, indicted in 1966 by the Union County Grand Jury, was the last physician to be convicted of a violation of *N.J.S.A.* 2A:87-1.

female patients has been impaired by prosecutorial action or the existence of *N.J.S.A.* 2A:87-1. In short, since 1967, New Jersey has not made it difficult for the physician to decide the best course of professional practice in relation to a patient's pregnancy.

More recently, on January 30, 1973, in the wake of this Court's decisions in *Roe* and *Doe*, the Attorney General of New Jersey instructed all prosecutorial authorities to enforce the New Jersey criminal abortion statute only insofar as consistaent with the Supreme Court's mandate. (64A). Specifically, persons licensed to practice medicine in New Jersey were not to be criminally prosecuted under *N.J.S.A.* 2A:87-1 where abortions were performed within physician-patient relationship. Likewise, those assisting or advising in the performance of such an abortion procedure would be exempt from the criminal sanctions of *N.J.S.A.* 2A:87-1.

Pursuant to the Attorney General's instructions, the criminal indictments lodged against Drs. Robert Livingston and Bernard Greenspan (Bergen County Ind. Nos. S-1548 and S-1549-72) have been dismissed. They, as well as all other duly licensed physicians, have been permitted, without State interference, to continue or embark upon treating their patients as they, as doctors, see fit. In short, the statute now before this Court is one that is applied only to laymen.

POINT I

THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER SINCE THE FEDERAL PLAINTIFFS FAILED TO PRESENT A CASE OR CONTROVERSY CAPABLE OF JUDICIAL RESOLUTION AND WERE WITHOUT STANDING TO CHALLENGE THE CONSTITUTIONAL VALIDITY OF NEW JERSEY'S ABORTION STATUTE

It is an unassailable tenet of our judicial system that courts cannot render judgments on federal constitutional questions unless presented in the form of a "case or controversy". *United States Constitution, Article III, Section 2.* Deeply embedded in our history is the corollary rule that the federal judiciary will not give advisory opinions. See, *e.g. Flast v. Cohen*, 392 *U.S.* 83, 95-98 (1968); *United States v. Fruehauf*, 365 *U.S.* 146, 157 (1961); *Federation of Labor v. McAdory*, 325 *U.S.* 450, 461 (1944); *Muskrat v. United States*, 219 *U.S.* 346 (1911). The settle principle against resolving abstract disputes in advance of constitutional necessity was "established as early as 1793, see 3 *H. Johnston, Correspondence and Public Papers of John Jay* 486-89 (1891), and . . . has been applied (by this Court) without deviation." *Flast v. Cohen, supra* at 96, fn. 14. See also C. Wright, *Federal Courts* 34 (2d ed 1963).

Embodied in the phrase "case or controversy" is a limitation on the business of the federal courts which confines their authority to deciding "questions presented in an adversary context and in a form capable of resolution through the judicial process." *Flast v. Cohen, supra* at 95.

Whether grounded in constitutional principle, see, *e.g. Commonwealth of Massachusetts v. Mellon*, 262 *U.S.* 447 (1923); *Fairchild v. Hughes*, 258 *U.S.* 126 (1922), or viewed as a mere policy limitation, see *Ashwander v. Tennessee Valley Authority*, 297 *U.S.* 288 (1936), this Court has long avoided passing prematurely on constitutional questions. Judicial authority may only be invoked when the interests of litigants require protection against actual interference. A hypothetical threat is not enough. Thus, the related doctrines of "standing", "ripeness", and "mootness" which have evolved over the years are incidents of the

"primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threated with harm, by the challenged action." *Poe v. Ullman*, 367 *U.S.* 497, 504 (1961). See also *Boyle v. Landry*, 401 *U.S.* 77 (1971). "The party who invokes the power to annul legislation on grounds of its unconstitutionality must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." *Id.* at 505. See also *United Public Workers of America v. Mitchell*, 330 *U.S.* 75 (1947); *Carter v. City of Fort Worth*, 456 *F.2d.* 572 (5th Cir. 1972); *Demby v. Wexler*, 436 *F.2d.* 570 (5th Cir. 1970).

While acknowledging the continued validity of these time-honored principles, the court below erroneously assumed jurisdiction, thereby improperly divesting the state judiciary of its traditional authority to define and enforce New Jersey's laws. The court's conclusion was grounded upon the federal plaintiffs' claim that they were directly and adversely affected by the continued enforcement of the allegedly defective statute. In reaching its decision, the court expressly rejected the State's contention that its enforcement policy, which gave effect to the constitutional principles of *Roe v. Wade*, 410 *U.S.* 113 (1973), served to deprive respondents of the requisite standing to maintain this action. According to the court, the danger of future prosecutions under New Jersey's criminal abortion statute tended to "chill" plaintiffs' right to practice their professions.

The court's reliance upon the elusive, esoteric and often abused concept of "chilling" was clearly misplaced. It is true that one whose exercise of certain constitutionally protected rights is discouraged or chilled by operation of a facially vague or overbroad statute has sufficient interest to attack its validity. See, *e.g. Police Department of Chicago v. Mosely*, 408 *U.S.* 92 (1972); *Epperson v. Arkansas*, 393 *U.S.* 97 (1968); *Cameron V. Johnson*, 390 *U.S.* 611 (1968). But it is a far different thing to suggest that every vague utterance of subjective chilling is sufficient to invoke federal jurisdiction. To the contrary, it bears repeating that a party seeking to attack the constitutional validity of a statute must show that he has sustained or is immediately in danger of sustaining direct injury. See *Laird v. Tatum*, 408 *U.S.* 1 (1972); *Younger v. Harris*, 401 *U.S.* 37 (1971); *Golden v.*

Zwickler, 394, *U.S.* 103 (1969). Allegations of a subjective chill or affect are not an adequate substitute for a claim of specific objective harm or a threat of specific future harm.[1] *Laird v. Tatum*, *supra*.

Plaintiffs' "compliance" with *N.J.S.A.* 2A:87-1 is not coerced by the risk of its enforcement against them. See *Poe v. Ullman*, *supra*. Compare *Lake Carriers v. MacMullen*, 406 *U.S.* 498 (1972). Petitioners' professed policy of non-enforcement is clear, and has been since 1967. Doctors have not been and will not be prosecuted under *N.J.S.A.* 2A:87-1.[2] The prosecutorial authorities of the State of New Jersey have steadfastly abided by the foregoing policy. "(I)t is well known that abortions have been and are performed by highly qualified physicians in highly reputable hospitals, when necessary to preserve the life or health of the mother, or to preclude the quickening of the fetus in rubella cases and the like." *Gleitman v. Cosgrove*, *infra*. (Jacobs J. dissenting). See also *Sanitary Vendors, Inc. v. Byrne*, 72 *N.J. Super.* 276, 287, 178 *A.2d* 259 Law Div. 1962), aff'd 40 *N.J.* 157 (1963).

Most importantly, the question of plaintiffs' standing in this case must be examined in light of the most recent pronouncement of prosecutorial policy, that the criminal abortion statute would be enforced in accordance with this Court's decision in *Roe*, *supra*, and *Doe v. Bolton*, 410 *U.S.* 179 (1973).[3]

---

[1] As noted by this Court in *Roe v. Wade*, *supra* 410 *U.S.* at _____, (93 S.Ct. at 733), criminal abortion statutes do not necessarily involve First Amendment rights. Although the New Jersey provision imposes a prohibition on any person who "prescribes or advises or directs" a woman to terminate her pregnancy by unlawfully justified abortion, it is submitted that *N.J.S.A.* 2A:87-1 does not violate First Amendment freedoms. It is only that advice which prescribes, advises or directs a woman to obtain an illegal abortion that is proscribed by the statute. The language is nothing more than a particular codification of the aider and abettor concept. *Cf. State v. Ellich*, 10 *N.J.* 146, 89 *A.2d* 685 (1952). Simply then, First Amendment concepts are not applicable since criminal acts do not fall within the "freedom of speech" protection. *Cf. Giboney v. Empire Storage and Ice Co.*, 336 *U.S.* 490, 498 (1949).

[2] Although the Supreme Court's ruling expanded the availability of abortions beyond that of the 1967 policy statement, no physician has been subjected to criminal prosecution since that time. See Statement of Facts, *supra*.

[3] Petitioner has offered to enter into a consent judgment to this effect. Of course, insulation from prosecution must be extended to those persons, not necessarily licensed physicians, who procure, advise or assist doctors in the performance of legal abortions.

On the basis of the foregoing, it is respectfully submitted that physicians should not be heard to complain as to the deficiencies in a statute that will not be enforced against them. As stated by Mr. Justice Frankfurter in *Poe v. Ullman, supra* at 507, "if the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed" by the federal courts. Such is the case here. While it may be that "no one should be placed in a posture of depending on a prosecutorial policy or prosecutorial discretion," *Roe v. Wade, supra* (Burger, C.J. concurring), the complaining party must first show that the statute attacked is in some sense applicable to his conduct. No such demonstration could be made in this case, for the Attorney General's enforcement directive foreclosed that possibility.[4] Moreover the action of the Attorney General was eminently reasonable, particularly in light of the expressed willingness of New Jersey's judiciary to construe the state's criminal abortion statute so as to conform with the most recent pronouncement of this Court. See *State v. Haren, et al.* 124 *N.J. Super* 475, 307 *A2d* 644, (Law Div. 1973). See Point III, *infra*. *Cf. Grayned v. City of Rockford*, 405 *U.S.* 104 (1972); *Cole v. Richardson*, 405 *U.S.* 676 (1972); *Ehlert v. United States*, 402 *U.S.* 99 (1971).

---

[4] The Attorney General is the chief law enforcement officer in the State of New Jersey (*N.J.S.A.*52:17B-101) and has general supervisory powers over county prosecutors. See *N.J.S.A.*52:17B-98; *N.J.S.A.* 52: 17B-19; *N.J.S.A.* 52:17B-103. In addition, the Attorney General may supersede a county prosecutor "in any investigation, criminal action or proceeding." *N.J.S.A.*52:17B-107. See also *N.J.S.A.*52:17B-106. In order to promote uniformity and an even-handed application of the law, the Attorney General has closely supervised all obscenity prosecutions. The enforcement directive is, thus, binding upon all state and county prosecutorial authorities.

POINT II

AS A GESTURE OF COMITY, THE THREE-JUDGE COURT SHOULD HAVE ABSTAINED FROM CONSIDERING THE MERITS OF THIS ACTION DURING THE PENDENCY OF STATE COURT ADJUDICATION OF THE CONSTITUTIONALITY OF *N.J.S.*2A:87-1

There are currently two actions pending in the Courts of New Jersey concerning the constitutionality of *N.J.S.A.*2A:87-1 in light of *Doe* and *Roe*. In *State v. Haren et. al*, 124 *N.J. Super.* 975, 307 A.2d. 644, (Law Div. 1973). Honoral Samuel Larner, A.J.S.C., concluded that the State's criminal abortion statute was constitutional as applied to laymen. Leave to file an interlocutory appeal was denied. In the second action, *State v. Norflett*, Monmouth County Indictment No. 657-72, the trial court declined to dismiss an indictment also charging a layman with criminal abortion. After a trial by jury, defendant-layman was convicted of the charge, and the matter is presently on appeal in the State appellate courts. In both cases the State readily concedes that the New Jersey criminal abortion statute could not be applied so as to regulate the conduct of licensed physicians acting in the physician-patient relationship. However, it is urged that the statute, which can obtain meaning only through judicial construction, could and should be read to prohibit all abortions performed by laymen.[5]

Petitioner's position is simply stated: courts are not in the business of striking down statutes where any other course of action would be appropriate. A statute should not be declared vague on its face where there exists a substantial class of situations to which the statute may validly be applied. See *United States v. National Dairy Corp.*, 372 *U.S.* 29,36 (1963); *United States v. Raines*, 362 *U.S.* 17,21 (1960); *United States v. Petrillo*, 332 *U.S.* 1,7 (1947). As the Supreme Court observed in *National Dairy Corp.*:

---

[5] It should be noted here that the New Jersey Statute prohibits only those abortions performed "maliciously and without lawful justification." The enactment does not, on its face, prohibit all abortions or limit the reasons which would justify the performance of such a procedure.

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harris*, 347 *U.S.* 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged." (372 *U.S.* at 36).

Similarly, overbreadth caused by court construction should not necessarily render a statute void. A statute may be preserved to the extent of its constitutionality. See *State v. Rosenfeld*, 62 *N.J.* 594, 601-602, 303 *A.2d* 889 (1973).

Getting to the specific case at hand, petitioner submits that a constitutional construction of *N.J.S.A.*2A:87-1 is possible.

The State does not dispute that the majority in *Roe* concluded that the Texas abortion statutes "as a unit must fall." (410 *U.S.* at ——, 93 *S.Ct.* at 733). That decision was premised on the fact that the deletion of the offending section (Art. 1196) limiting the reasons for which an abortion would be permissible leaves, ". . . the State . . . with a statute proscribing all abortion procedures no matter how medically urgent the case." (410 *U.S.* at ——, 93 *S.Ct.* at 733; see the pertinent statute at 410 *U.S.* at ——, 93 *S.Ct.* at 709, n.l). It was only under this situation that the Court concluded the statute involved "as a unit must fall."

Certainly, the intent of this Court can be gleaned from the decision in *Doe v. Bolton*, 410 U.S. 179 (1973), where the majority upheld the constitutionality of the abortion statute by excising the offending portions. Thus, once the limitations on the reasons governing the availability of abortion had been deleted and the procedural conditions requisite to eligibility for the operation eliminated, the constitutionality of the statute involved was upheld (410 *U.S.* at ——, 93 *S.Ct.* at 743-744, 746-752).

This Court's action subsequent to the decisions in *Roe* and *Doe* is also relevant.[6] In *Cheany v. Indiana*, 410 *U.S.* 991, 93 *S.Ct.* 1516, decided March 19, 1973, certiorari was denied to a non-doctor on the ground that he lacked standing to complain as to the unconstitutionality of the criminal abortion statute. Like the New Jersey Supreme Court in *State v. Moretti*, 52 *N.J.* 182, 244 *A.2d* 499, *cert.* denied 393 *U.S.* 952 (1968), this Court thus concluded that a non-doctor was not prejudiced by any statutory vagueness or by the hypothetical statute's "invasion" of a woman's right of privacy.

It is submitted that the constitutionality of the New Jersey criminal abortion statute (*N.J.S.A.*2A:87-1) could be upheld as that statute applies to laymen. First, non-licensed individuals do not sustain any prejudice by the lack of specificity in the statute, for lay "defendants . . . could not fail to be aware that the abortion they conspired to commit would violate the statute." (*State v. Moretti*, 52 *N.J.* at 193-194, 244 *A.2d* at 505). Moreover, as laymen they do not have the right to raise the privacy issue, for that comes to fore only in a physician-patient relationship.

Finally, and most importantly, the New Jersey statute does not prohibit all abortions or limit, on its face, the reasons or circumstances under which abortions may be performed. Compare the Texas statute involved in *Roe*. The New Jersey statute prohibits only those abortions performed "maliciously or without lawful justification." By using that phrase, the Legislature left "the matter to interpretation by the judiciary." *Gleitman v. Cosgrove*, 49 *N.J.* 22, 53 *A.2d* 689,706 (1967) (Jacobs, J. dissenting). "While it (the Legislature) must have contemplated the

---

[6] Few courts have had the opportunity to review the constitutionality of particular abortion statutes as to laymen since *Roe* and *Doe*. Most of the courts presented with the issue concluded, like *Roe*, that the offending limitation on the reasons governing the availability of abortion could not be stricken, for all that would remain would be language of total prohibition with no distinction between laymen and licensed medical personnel. See *People v. Frey*, 294 *N.E.2d* 257, 13 *Cr.L.Rptr.* 2111 (Ill. Sup. Ct. 1973); *State v. Hultgren*, 204 *N.W.* 2d 197, 12 *Cr.L.Rptr.* 2426 (Minn. Sup. Ct. 1973); *Sasaki v. Commonwealth*, 13 *Cr.L.Rptr.* 2253 (Ky. Ct.App. 1973); *State v. Munson*, 13 *Cr.L.Rptr.* 2166 (S.D. Sup. Ct. 1973); and *Doe v. Woodahl*, 13 *Cr.L.Rptr.* 2377 (U.S.D.C. Mont. 1973). See also Wisconsin Attorney General's remarks, 13 *Cr.L.Rptr.* 2063. Compare *May v. State*, 492 *S.W.* 2d 888 (Ark. Sup. Ct. 1973), which concluded that laymen have no standing to urge the unconstitutionality of abortion statutes.

judiciary would endeavor to carry out the overall legislative purpose, it must also have contemplated that interpretation of its broad and flexible terminology would appropriately be made from time to time in the light of prevailing conditions." *Id.* See *State v. Rosenfeld, supra.*

It is submitted that an interpretation by the State courts now, in the wake of *Roe* and *Doe*, would be timely. The duty of the State courts, unlike a federal court reviewing a state enactment, is to construe a statute, if possible, so as to render it constitutional. The primary intent of the Legislature should be determined. *Cf. Schmoll v. Creecy*, 54 *N.J.* 194, 202, 254 *A2d* 525 (1969); *State v. Hudson County News Co.*, 41 *N.J.* 247, 265, 196 *A2d* 225 (1963). The Legislature sought the enactment of *N.J.S.A.*2A:87-1 primarily out of concern for the woman's health and safety. *State v. Murphy*, 27 *N.J.L.* 112, 114-15 (Sup. Ct. 1858). If the State courts should interpret *N.J.S.A.*2A:87-1 as a health measure, and restrict its application to persons not licensed to practice medicine, the constitutional question to be determined by the federal courts would undoubtedly be different. Such a construction would leave no doubt as to the constitutional validity of the statute, and would at the same time protect the interests of the federal plaintiffs herein.

It is suggested that the three-judge court should have abstained from considering the constitutionality of *N.J.S.A.*2A:87-1 at this time, retaining jurisdiction of the cause pending adjudication in the State courts. See *American Trial Lawyers Assn., New Jersey Branch, et al. v. New Jersey Supreme Court*, 409 *U.S.* ——, (No. 72-691, decided January 15, 1973.

Although not strictly within the contemplation of the literal rule enunciated in *Railroad Commission v. Pullman Co.*, 312 *U.S.* 496 (1941), the posture of this case is analogous. The landmark decisions of *Roe* and *Doe* represent a radical departure from past precedent in the field of abortion legislation. State courts are bound to consider State statutes in light of this Court's innovations in this area, and are thus in the same position as if they were faced with the task of construing a newly enacted statute. The federal courts are, on the other hand, at a disadvantage because they are unable to predict with accuracy what the State courts will do when faced with the issue. Often, the federal courts

could only give a tentative answer "which may be displaced tomorrow by a State adjudication." *Id.* at 500. In this respect, the situation in the case at bar is similar to that which prompted the *Pullman* abstention doctrine.

There is no question that the statute involved is susceptible to a saving construction, ant that the State courts, if given the opportunity, would accept that responsibility. *State v. Haren, et al., supra.* Suffice it to say that *N.J.S.A.*2A:87-1 is not overbroad on its face—for the statute proscribes only the performance of abortions "without lawful justification." The meaning of that phrase, and therefore the purview of the statute, was left for judicial determination. Therefore, if the latest construction of *N.J.S.A.*-2A:87-1 sweeps too broadly (see *State v. Brandenburg,* 137 *N.J.L.* 124, 58 *A2d* 704 (Sup.Ct. 1948) and *Gleitman v. Cosgrove,* 49 *N.J.* 22, 227 *A.2d* 689 (1971), it is the result of the judicial delineation of the bounds of a statutory proscription may be re-examined if within the intention of the legislative enactment. See *State v. Rosenfeld, supra.* That being the case, it is respectfully submitted that the district court was unjustified in declaring *N.J.S.A.*2A:87-1 void on its face, for such a conclusion not only undermines a cardinal rule of constitutional litigation—that the constitutional issue be determined on the narrowest possible ground—but causes needless tension in federal-state relations, as well as results in uncertainty as to the validity of the proscription. See e.g. *State v. Coleman.* 46 *N.J.* 16, 214 *A.2d.* (1965), *cert. denied* 383 *U.S.* 950 (1966).

POINT III

UNDER THE CONCEPT OF EQUITABLE ABSTENTION, THE COURT BELOW SHOULD HAVE DECLINED TO EXERCISE JURISDICTION.

Speaking for the majority of the Court, Mr. Justice Black in *Younger v. Harris*, 401 *U.S.* 37 (1971), pointed out that the ancient doctrine of equitable abstention which developed in the British judicial system "is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Id.* at 44.

The doctrine of equitable abstention is founded in comity as well as judicial efficiency. Comity has been defined by the Court as:

> "a proper respect for state functions, as recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*

Among those "separate functions" left to the states is the primary responsibility of protecting its citizenry from its criminal elements.

On the same day that the Court decided *Younger v. Harris*, it handed down it decision in *Samuels v. Mackell*, 401 *U.S.* 66 (1971). There, the Court held that the same principles which govern the propriety of issuing federal injunctions against state criminal proceedings also apply to the granting of federal declaratory judgments. The majority of the Court thus discerned no difference between the propriety of issuing declaratory relief where a "criminal proceeding was begun prior to the federal civil suit . . . (D)eeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid." *Id.* at 72.

In the *Younger* case, the majority opinion issued a cautionary proviso:

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun," 401 *U.S.* at 44.

It is submitted that this Court in *Boyle v. Landry*, 401 *U.S.* 77 (1971), began to formulate guidelines for the application of the equitable abstention doctrine to federal actions involving constitutional challenges to state criminal statutes where no state proceeding involving both the federal plaintiffs and the statute was pending or imminent. In *Boyle*, the plaintiffs alleged that Illinois statutes prohibiting mob action, resisting arrest, aggravated assault, aggravated battery and intimidation were unconstitutional and that,

> "Negroes were being intimidated in the exercise of their First Amendment rights (1) through the wholesale use of all the statutes alleged to be unconstitutional to prosecute members of the Negro community . . ." *Id.* at 78.

The complaints also alleged that the defendant therein had threatened to enforce all of the statutes for the "the sole purpose of harassing and intimidating the plaintiffs." *Id.* The Court decided that it should not entertain the action despite the fact that there was no state action pending or imminent:

> "It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute which the court below held unconstitutional." *Id* at 80-81.

The Court concluded by observing that:

> "The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here.
>
> "For the reasons set out above and for those set out at greater length today in *Younger* and *Samuels*, we reverse." *Id* at 81.

It is clear that the *Boyle* decision was based on a balancing criterion, *i.e.*, the "quality" of the allegations in the complaint in light of the established policy against "interference by the federal courts with state law enforcement . . ." *Id.* There is also language in *Boyle* that suggests that denial of relief was based on traditional rules of equity and considerations of federalism:

> "There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in jeopardy of suffering irreparable injury if the state is left free to prosecute under the intimidation statute in the normal manner." *Id.* at 81.

This passage appears to indicate that the *Younger* standards of bad faith and harassment are to be extended to situations in which no prosecution is pending. Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 *Colum.L.Rev.* 874, 890-891 (1972).[7]

While this Court in *Lake Carriers Ass'n v. MacMullen*, 406 *U.S.* 498 (1972), in dictum stated that *Younger* had "little force in the absence of a pending state proceeding," the comment was not made in the context of an action which would interfere with

---

[7] See e.g., *Embry v. Allen*, 401 *U.S.* 489 (1971); compare *Becker v. Thompson*, 459 *F.2d* 919 (5th Cir. 1972), reh. den., 463 *F.2d* 1338 (1972, with *Jones v. Wade*; ____*F.2d* ____, 13 *Cr.L. Rptr.* 2262, 2263 (1973); *Cooley v. Endictor*, 340 *F.Supp* 15, (N.D. Ga. 1971), aff'd 458 *F.2d* 513 (5th Cir. 1972), cert. den. 409 *U.S.* 1115 (1973); *Cf. Ryan v. Spector*, 332*F.Supp.* 23 (E.D.Pa. 1971).

active state criminal law enforcement. Thus, the Court did not mention *Boyle v. Landry, supra,* although there can be no doubt *Boyle* was decided as one of the abstention sextet. Instead, the Court relied on Mr. Justice Brennan's opinion in *Perez v. Ledesma,* 401 *U.S.*82 (1971) at 93 which may indeed be viable in a context as was extant in *Lake Carriers.* Factually, the Court in *Lake Carriers* was faced with a statute that the State admittedly had no intention to enforce criminally, even though criminal sanctions were available thereunder. Thus, there could have been no disruption to state enforcement of a criminal statute. See also *Lewis v. Kugler,* 446 *F.2d* 1343 (3rd Cir. 1971), which did not involve a statute at all; rather, plaintiffs there challenged an alleged unconstitutional practice on the part of the New Jersey State Police.

To reiterate, reliance is placed on *Boyle v. Landry, supra,* and the balancing criterion therein developed. As here, *Boyle* involved the appropriateness of federal intervention in state law enforcement by litigating the constitutionality of state criminal statutes. It is submitted that the apparent different "treatment" of the equitable abstention issue in *Boyle* and *Lake Carriers* is thus best explained by the effects of the particular litigation on state law enforcement efforts. In making this distinction, this Court apparently recognized the primary obligation of the states to protect its residents, on an every day basis, from the forces of crime.

That is not to say that there are no situations in which the federal court should have the duty to act against state action or their criminal statutes. Most involve some showing of impropriety on the part of state officials. One area where federal courts should be free to act, whether or not state criminal proceedings are pending, is where an individual's federal rights "will inevitably be denied by the very act of bringing the (state criminal) defendant to trial in the state court." See *e.g., City of Greenwood v. Peacock,* 384 *U.S.* 808, 828 (1968). In addition, the doctrine of equitable abstention may not be applicable where the federal litigation would have no appreciable effect on current state criminal law enforcement responsibilities. See *e.g. Lake Carriers v. MacMullan, supra.* Neither situation, however, is involved in the case now before the Court. There is no constitutional impediment to a criminal prosecution for the performance of an abortion per se. See *Roe v. Wade, supra; Doe v. Bolton,* 410 *U.S.*

179 (1973). Moreover, the statute here involved is neither moribund nor is there any indication on the part of the State authorities not to enforce the provision.

Petitioners respectfully submit that whether a prosecution is pending at the time an individual seeks declaratory and/or injunctive relief in a federal court is but one of several factors to be weighed in deciding whether equitable abstention is to be applied in a particular case. The principles of equity and federalism demand that this Court balance the federal plaintiffs' need for relief against certain disruption to state law enforcement activities and ongoing judicial proceedings. Comity considerations pertain at all times, whether a criminal prosecution is pending or not. *Cf. Fenner v. Boykin*, 271 *U.S.* 240 (1926); *Independent Tape Merchant's Association v. Creamer*, 346, *F.Supp* 456 (M.D. Pa. 1972).

In the case at hand, the federal plaintiffs are not in doubt as to their rights and responsibilities in practicing medicine in the State of New Jersey. Specifically, there is no doubt that *N.J.S.A.* 2A:87-1 does not apply to a duly licensed doctor acting in the physician-patient relationship. Certainly, under such circumstances, it can hardly be said that the federal plaintiffs will suffer irreparable injury, or harm of any nature, if the federal court below had declined to exercise its jurisdiction. On the other hand, the uncertainty engendered by federal intervention (see *State, v. Coleman*, 46 *N.J.* 16, 214*A.2d* 393 (1965), *cert.* denied 383 *U.S.* 150 (1966)), and the effect on State law enforcement is evident. Under such circumstances, it is respectfully submitted that the prudent administration of the federal judiciary mandated abstention in this case.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of *certiorari* to the United States District Court for the District of New Jersey be granted.

Respectfully submitted,
GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY PRO SE
STATE HOUSE ANNEX
TRENTON, NEW JERSEY 08625

Alfred J. Luciani
Deputy Attorney General
Division of Criminal Justice
Appellate Section
7 Glenwood Avenue
East Orange, New Jersey 07017

Of Counsel and on the Petition
Lois A. De Julio
Legal Assistant
On the Petition

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGE FOR PEACE AND FREEDOM, ANN IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., JACK L. WARD, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., AND RALPH DEAN CAVALLI, M.D.,

Plaintiffs,

—vs—

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendant.

Civil Action No. 264-70

JOANNE ABRAMOWITZ, et al.,

Plaintiffs,

—vs—

GEORGE F. KUGLER, Attorney General of the State of New Jersey, LLOYD W. McCORKLE, Commissioner of the State of New Jersey, Department of Institutions and Agenices,
NEWARK BETH ISRAEL MEDICAL CENTER, individually and as representative of all licensed medical facilities,

Defendants.

Civil Action No. 431-70

Before: FORMAN, C.J., BARLOW, D.J. and GARTH, D.J.

OPINION

Appearances:

In YWCA v. Kugler:

Richard I. Samuel, Esq.,
Attorney for Plaintiffs,
Roy Lucas, Esq. (District of Columbia Bar)
of Counsel

Hon. George F. Kugler, Jr., Attorney General of New Jersey, by Barry H. Evenchick, Esq., Assistant Attorney General,
Attorney for Defendant.

In Abramowitz v. Kugler:

Rita K. Murphy, Esq.
Laura Jane Kahn, Esq.
Jeffrey E. Fogel, Esq.,
Attorneys for Plaintiffs: Hannah Borenstein, Gail Burt, Frances M. Catrambone, Emmillie Fox, Ursula Good, Mary Ann Hamilton, Margaret Holmes, Barbara Jackson, Marguerite Joralemon, Irene Montgomery, Joanne Noonan, Martha Paravati, Marilyn Speziale, Alberta Thomas, Betty Thomas, Deborah Tripp, Mercedes Valle, Mary Wright and Anna Marie Zangari.

Appearances: (Continued)

Ann Marie Boylan, Esq.,
Pro Se.

Nadine Taub, Esq.,
Attorney for All Other Plaintiffs,
Nancy Stearns, Esq. (New York Bar)
Of Counsel

Hon. George F. Kugler, Jr., Attorney General of New Jersey, by Barry H. Evenchick, Esq., Assistant Attorney General,
Attorney For Defendants George F. Kugler, Jr. and Lloyd W. McCorkle.

Lowenstein, Sandler, Brochin, Kohl & Fisher, Esqs.,
Attorneys for Defendant Newark Beth Israel Medical Center.

Amici Curiae:

The Planned Parenthood Federation of America, Inc.,
by Hannoch, Weisman, Stern & Besser, Esqs.,
Attorneys
Greenbaum, Wolff & Ernst, Esqs.
Of Counsel,
In Support of Plaintiffs in YWCA v Kugler.

New Jersey Right to Life Committee,
Christian Action Foundation,
New Jersey Catholic Conference,
by Stephen J. Foley, Esq.
In Opposition in YWCA v. Kugler and Abramowitz v. Kugler.

FORMAN, C.J.

Two cases raising numerous constitutional challenges to the New Jersey abortion and related statutes are presented for disposition here. Plaintiffs in the first suit, *Y.W.C.A. v. Kugler*, No. 264-70, (*Y.W.C.A.*), are nine physicians, two of whose licenses have been revoked following prosecution under the challenged statutes; three women appearing for themselves and on behalf of the membership of the New Jersey Branch of the Women's International League for Peace and Freedom; and one woman appearing for herself and on behalf of the Young Women's Christian Association of Princeton, New Jersey. George F. Kugler, Jr., the Attorney General of the State of New Jersey, is named as defendant. Plaintiffs contend that N.J.S.A. §2A:87-1[1] and §45:9-16[2] deprive physicians and women of constitutional rights guaranteed by the First, Fourth, Fixth, Sxth, Eighth, Ninth and Fourteenth Amendments. Jurisdiction is invoked under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2284 and 42 U.S.C. §1983.

Plaintiffs in the second suit, *Abramowitz v. Kugler*, No. 431-70, (*Abramowitz*), are approximately 1200 women, appearing for themselves and on behalf of all other New Jersey women similarly situated and allegedly suffering violations of their constitutional rights. In addition to the Attorney General of the State of New Jersey, plaintiffs name as defendants Lloyd W. McCorkle, Commissioner of Institutitons and Agencies of the

State of New Jersey, and Newark Beth Israel Medical Center.[3] Plaintiffs claim that N.J.S.A. §2A:87-1[4] §2A:87-2,[5] §2A:170-76[6] and §45:9-16[7] violate the rights of women under the First, Fourth, Fifth, Ninth, Fourteenth and Nineteenth Amendments to the Constitution. Jurisdiction is invoked under the foregoing Amendments and under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2284, 42U.S.C. §291 *et seq.* (the Hill-Burton Act), 42 U.S.C. §1336 *et seq.* (Medicaid), and 42 U.S.C. §1983.

A three-judge court was convened pursuant to 28 U.S.C. §2285, in both cases, which were consolidated for purposes of a hearing and all further proceedings. Briefs were filed and oral arguments were presented. Plaintiffs seek summary judgment on requests for a declaratory judgment that the statutes respectively challenged are unconstitutional, and seek injunctions against their operation and enforcement. In addition two of the plaintiff-physicians in *Y.W.C.A.* seek expungement of criminal records resulting from their convictions under the statute, and the return of their medical licenses, by order of this court.

Permission to appear as *amici curiae* was granted to the Planned Parenthood Federation of America, the New Jersey Right to Life Committee, the Christian Action Foundation and the New Jersey Catholic Conference, on all of whose behalf briefs were submitted.

I. STANDING

Defandants first contend that plaintiffs lack standing because they have not shown the existence of a case or controversy sufficient to invoke the jurisdiction of the court, and the issues raised are of a political and social, rather than a legal, nature and should properly be left to the state legislature for resolution.

Article III, sec. 2 of the Constitution, which limits judicially cognizable issues to those involving an actual "case" or "controversery", is the source of the standing requirement and, although outwardly simple, reflects principles fundamental to the operation of our judicial system:

> "In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution

through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine."[8]

In addition, the standing requirement reflects a judicial rule of self-restraint, designed to avoid passing upon prematurely raised or ill-defined controversies involving constitutional questions.[9]

Since the passage of the Declaratory Judgement Act in 1934,[10] it has been said that the Act "intended to liberalize conceptions of justiciability".[11] It was not, however, intended to enlarge the jurisdiction of the courts,[12] and has in no way diminished the necessity of a party seeking a declaratory judgment to establish a case or controversery and thus, the standing requisite to the maintenance of a suit. This is manifest from the language of the statute itself[13] and from the Supreme Court's exposition of the prerequisites to a declaratory judgement:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversery, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[14]

Expressing these principles in another way, the Court has stated that:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 369 U.S. 186, 204 (1962)."[15]

These principles have been reaffirmed in *Golden v. Zwickler*:[16]

> "No federal court, whether this Court or a district court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*' *Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885). (Emphasis added.)."

Examining the allegations of plaintiff-physicians in *Y.M.C.A.* in light of these principles it is clear that they have fulfilled both constitutional and judicially formulated standing requirements. They allege that the abortion statute is vague on its face and as applied in violation of the specificity requirement of the Fourteenth Amendment; that it deprives physicians of the right to practice, and that it violates the rights of physicians and their women patients to privacy in their physician-patient relationships, as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

As a result of prosecutions under the statute, two of the plaintiff-physicians have lost their licenses to practice medicine and one was incarcerated at the time this action was commenced. In addition, all allege that they have been forced to turn away patients seeking advice and information about the possibility of obtaining abortions.

In light of these circumstance, *Tileston v. Ullman*,[17] emphasized by defendants to oppose standing, is clearly distinguishable. In *Tileson*, a physician challenged Connecticut's contraceptive statutes as violative of his patients' constitutional rights, but failed to allege any violation of his own personal or property rights. On the basis of these allegations it was held that no case or controversery existed as to him. In the present case, on the contrary, physicians have fully alleged past, present and continuing violations of their own liberties. Nor is this court persuaded by the reasoning applied in *Doe v. Randall*,[18] where the court held that no case or controversery had been presented by a physician who had performed an abortion, but against whom no indictment had been returned. The fact of prior prosecutions under the abortion statute, and the allegations of violations of

plaintiff-physicians' own constitutional rights are sufficient to establish a *prima facie* case or controversery. Thus, the physicians clearly have standing.

Moreover, the violations of their constitutional rights alleged by plaintiff-physicians are closely interwoven with and inseparable from the allegations they make on behalf of their women patients for violations of their consitutional rights. The contention that the alleged rights to freely practice medicine according to the highest standard of medical practice, and to privacy in physician-patient relationships entitle physicians to advise and direct women patients concerning abortion, and to perform abortions, is inextricably linked with and dependent upon adjudication of the alleged right to privacy of their patients in securing abortions. Thus, it is appropriate here to grant plaintiff-physicians standing to litigate the alleged deprivations of the constitutional rights of their women patients.[19]

Plaintiffs numbering approximately 1200 in *Abramowitz* claim standing on the basis that they belong to, and appear on behalf of, the class of New Jersey women "who as women . . . suffer under the New Jersey abortion laws". In their complaint, as amended, brief and oral argument they assert that New Jersey women constitute the class most directly affected by the abortion statute, and that is "no person with a greater personal stake in the question of the consitutuionality of the New Jersey abortion statute than any fertile woman of child-bearing age". Plaintiffs argue that such a woman may *at any time* experience an unwanted or accidental pregnancy, in which case she will be forced either to bear an unwanted child or to risk the hazards of an illegal "backstreet" abortion. Plaintiffs contend further that these consequences are forced upon women by operation of the statute, in violation of their constitutional rights to life and liberty and equal protection of laws under the Fourteenth Amendment, and their right to privacy under the Ninth Amendment. They argue additionally that the effect of the statute in compelling them to bear unwanted children is to perpetuate an inferior status which the Nineteenth Amendment was intended to eradicate, and that the statute violates the proscription against an establishment of religion and the free exercise thereof under the First Amendment. Plaintiffs claim finally that the period of time available during pregnancy is insufficient for full litigation, and that, practically,

they will be unable to redress deprivations of their constitutional rights without a grant of standing here.

It is apparent that the alleged deprivations of constitutional rights depend upon the contingency of pregnancy. It is only then that women must choose between bearing an unwanted child and an abortion, and that the alleged constitutional deprivations take on immediacy and reality. However, aside from an allegation that women are compelled, under the present law, to subject their bodies to the possible dangers of oral and other contraceptives prior to pregnancy, plaintiffs have not shown a specific invasion of individual rights or threat of harm which arises prior to the occurrence of pregnancy. Nor do they allege that any of them is pregnant with an unwanted child or is seeking an abortion. Plaintiffs do allege that some of them have already been forced to choose between these two alternatives. But no plaintiff has shown that she is presently confronted with this problem.

While there may be a class of New Jersey women presently threatened as described by plaintiff-women, their contention that they are members thereof is unsupported by their complaint, as amended, their brief, or oral argument. We must conclude that the constitutional infirmities and deprivations alleged to flow from the statute are of a hypothetical and abstract nature as to these plaintiffs.

This conclusion is amply supported by prior adjudications involving the question of standing. In *Flast v. Cohen*,[20] upon which plaintiffs rely, the Court held that federal taxpayers possessed standing to litigate the constitutionality of allocations of federal funds to finance instruction in sectarian schools. The Court held that the plaintiff-taxpayers had shown an important personal stake in the outcome of the litigation, in the form of an immediate threat to their constitutional rights. It observed that the utilization of federal tax monies for such a purpose might well violate plaintiff-taxpayers' and all citizens' constitutional rights to be free of governmental establishment of religion. Thus a logical nexus existed between the violations alleged and the harm threatened to the plaintiffs in their status as federal taxpayers. In the present case we cannot find such a link between the alleged violations and the harm threatened to plaintiffs as women.

In *Barrows v. Jackson*,[21] money damages were sought against petitioner, a Caucasian, for breach of a racially restrictive covenant. Her claim of standing to litigate alleged violations of

the constitutional rights of black citizens by state judicial enforcement of the covenant was upheld by the Court. It found, in addition to the threat of a substantial pecuniary loss, which was sufficient to confer standing, that "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court"[22] In the present case, as discussed above, plaintiff-physicians in *Y.W.C.A.* have standing to assert deprivations of the constitutional rights of their women patients. In fact, the complaint in *Y.W.C.A.* alleges most of the deprivations of the constitutional rights of women asserted by plaintiffs in *Abramowitz*. Hence, we are not faced with a factual situation in which it would be difficult, if not impossible, for the constitutional violations alleged to be adjudicated without a grant of standing to plaintiff-women. This is not one of the "unique situations" in which considerations of "broad constitutional policy" indicate a relaxation of the standing requirement.[23].

The circumstances of the present *Abramowitz* case, on the contrary, are more closely analogous to the facts involved in *Zwickler v. Koota*[24] and successive litigation in *Golden v. Zwickler*.[25] In the first case, the petitioner had been convicted of distributing anonymous political handbills enveighing against a congressman in violation of a New York State law, and sought a declaratory judgment that the statute was unconstitutional, stating his intention to distribute more handbills opposing him in the next election. A three-judge court abstained from determining whether the petitioner was entitled to a declaratory judgment. The Supreme Court reversed and remanded. *Zwickler v. Koota, supra.* Meanwhile, the congressman against whom petitioner's handbills were to be directed had left the Congress for a place on the Supreme Court of New York, which carried a term of fourteen years. The District Court held on remand that the lack of immediate threat to the petitioner of enforcement of the statute would not prevent it from issuing a declaratory judgment, and held the statute unconstitutional. On an appeal from this decision, the Court, in *Golden v. Zwickler, supra,* again reversed, holding that petitioner had not presented his constitutional question "in the context of a specific live grievance"[26] and that a hypothetical threat to his rights was insufficient to support a declaratory judgment.[27]

This reasoning is equally applicable to the situation of plaintiffs in *Abramowitz*. They do not possess standing to assert the claims of the class they purport to represent since no immediate threat exists which would indicate the presence of a case or controversy as to them before this court. Moreover, this reasoning is likewise applicable to women plaintiffs in *Y.W.C.A.* The contentions of plaintiffs in *Abramowitz* and of those in *Y.W.C.A.*, as individual women and on behalf of the organizations they claim to represent amount to no more than allegations that they "feel inhibited"[28] by the operation of the abortion statute. Finding no distinction between them and absent a showing of a live controversy or immediate threat of injury, so much of the complaint as pertains to the allegations of the women-plaintiffs in *Y.W.C.A.*, individually, and allegedly on behalf of the Young Women's Christian Association of Princeton, New Jersey, and the New Jersey Branch of the Women's International League for Peace and Freedom[29] will be dismissed for lack of standing. On the same ground the complaint in *Abramowitz* must fall.[29a]

There remain the issues raised in the *Y.W.C.A.* complaint against the defendant Attorney General by the physician-plaintiffs for themselves, and on behalf of their women patients, to which the following discussion is addressed.

II. ABSTENTION

The Attorney General next urges that this court should abstain from entertaining plaintiffs' requests for declaratory and injunctive relief. In *Zwickler v. Koota*,[30] the Supreme Court expressed the broad general principle that Congress:

> "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ' . . . to guard, enforce, and protect every right granted or secured by the Constitution . . . . ' "

Under the rule of *Zwickler* it has been held that a federal court may avoid its duty to accept federal constitutional claims only in "narrowly limited 'special circumstances' "[31] One of these special circumstances is:

> "when a decision concerning a question of state law is necessary to a disposition of the case, and the answer to the state question involves unclear state law or a matter of paramount interest to the state."[32]

Foremost, however, is "the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question".[33] The Attorney General contends that the present case falls within this exception and relies on *Reetz v. Bozanich*,[34] and *Rogers v. Danforth*.[35] They are, however, clearly distinguishable from the present case. In *Reetz*, the Supreme Court held that a federal district court had erred in refusing to abstain from issuing a declaratory judgment where Alaska statutes regulating salmon licensing and attacked by plaintiffs had not yet been the subject of any adjudication in the state's courts. In *Rogers*, a federal district court abstained from hearing a challenge to Missouri's abortion statute on the grounds that the state court had not yet authoritatively construed the statute. In both cases, it was felt that state court adjudications might have avoided or resolved the issues raised in the federal district court. In the present case, on the contrary, the statute in question has been the subject of state judicial scrutiny, and the constitutional issues raised here have not been avoided or resolved by adjudication in the state courts. The Supreme Court of New Jersey has held the abortion statute susceptible of constitutional construction,[36] and it is in light of the New Jersey state adjudications that constitutional infirmities are alleged still to exist. The entertainment of this case, therefore, would not precipitate a premature federal disposition of constitutional questions which might be avoided or resolved in a state adjudication if this court abstained. Nor do the constitutional issues raised here involve any questions of unclear state law or an issue of paramount interest to the state, which should be resolved first in a state court. Thus, the "special circumstances" which demand abstention are lacking in the present case.[36a]

Although this conclusion would normally terminate our inquiry, the abstention question must be further examined in light of the issues raised by the Supreme Court in a group of six related cases, decided after the hearing in this case, which restricted the situations in which declaratory and injunctive relief against pending proceedings under a state criminal statute may be granted by a federal district court.[37] *Younger v.Harris*[38] was an appeal from the decision of a three-judge court of the Central District of California enjoining a prosecution pending under a state criminal statute, and, as "other and further relief", declaring the statute unconstitutional. This decision was reversed by the Supreme Court, which limited the grounds justifying federal injunctive relief to the "special circumstances" where a threat of great and immediate irreparable injury is shown.

More important to the prayer for declaratory relief in the present case, however, was the Court's overturning of the declaratory judgment in *Younger* on the basis of its holding in *Samuels v. Mackell:*[39]

> "in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well."

It is clear that *Younger* and *Samuels* indicate a modification of the rule govening declaratory judgments stated in *Zwickler v. Koota, supra,* in cases where a prosecution under a state criminal statute is pending, and now restrict the criteria for federal declaratory relief to those justifying federal injunctive relief—that is, a threat of great and immediate irreparable damage.[40] The question left open by the Court is whether these principles should be applied to a case like the present, where no state criminal proceeding was pending when the declaratory judgment and the injunction against enforcement of the statute were sought.[41]

Examining the rationale underlying these decisions, it appears that the Court was strongly influenced by the disruptive ef-

fects of federal interference with *pending* state prosecutions. Federal intervention in such cases, which for all practical purposes results in parallel litigation of the same case in the two court systems, may seriously interrupt the smooth and efficient operation of both judicial systems. It will almost always interfere at least with state court proceedings since a federal district court can effectuate its declaratory judgments by enjoining the state proceedings. The effect of a declaratory judgment in these circumstances becomes virtually the same as that of an injunction, for either type of relief ultimately compels a halt in a state prosecution. Such a consequence in itself constitutes a severe blow to the delicate balance between the federal and state judicial systems and the principles of comity which enforce and protect it. Moreover, federal judicial interference in on-going state prosecutions may involve violations of the Federal Anti-Injunction statute,[42] in which the prohibition against federal judicial intervention in pending state proceedings has always been held to embody a basic principle in the separation of the state and federal judicial systems.

Upon a consideration of *Younger* and its related cases, however, we are not persuaded that the reasoning and fundamental policies voiced therein are applicable to the petition for declaratory judgment in the instant case, where no state prosecution was pending against the plaintiffs at the time federal relief was sought. Here, the consideration of a request for declaratory judgment does not constitute an adjudication of the plaintiffs' claims simultaneously in two judicial forums, and therefore does not involve the certain disruption of an on-going state proceeding with which the Supreme Court was concerned in *Younger* and the related cases. Thus, the entertainment of a petition for declaratory judgment in the circumstances of the present case is not analogous to injunctive relief and we are not persuaded that it must be governed by the limited "special circumstances" which justify the issuance of an injunction. Hence, we conclude that it is appropriate here to consider the plaintiffs' petition for declaratory relief.[43]

III. INJUNCTION

Plaintiffs' request for injunctive relief, however, raises an

abstention question of a different dimension. A line of decisions, of which *Younger* is but a recent example, reflect the established judicial principle that injunctions issued against pending or threatened prosecution under state criminal statutes severely threaten the integrity of orderly state judicial process, and the balance of the federal and state judicial systems. Hence, injunctive relief has long been an extraordinary judicial measure appropriate only in "special circumstances".[44] In order to obtain injunctive relief a petitioner must show more than the threat of injury which is "incidental to every criminal proceeding brought lawfully and in good faith . . ."[45] Rather, he must show a threat of great and immediate irreparable injury.[46]

In *Dombrowski v. Pfister*,[47] irreparable injury to the petitioners was established where state officials had utilized a statute in bad faith and for the purpose of harassment. The court found full support for the allegations that:

> "the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."[48]

Finding that these threatened actions exerted a severe "chilling effect" upon the petitioners in the exercise of their First Amendment freedoms, and that "defense of the State's criminal prosecution (would) not assure adequate vindication of (petitioners') constitutional rights,"[49] the Court granted an injunction.

Subsequently, in *Cameron v. Johnson*,[50] the Court affirmed the refusal of a federal district court to issue an injunction against enforcement of a state statute regulating picketing on the grounds that the statute was not vague and overbroad, and was not being utilized by the state in bad faith to discourage civil rights activities. It also stated that any chilling effect on picketing as a form of freedom of expression that might result from a good-faith enforcement of the statute was insufficient to justify in-

junctive relief. This reasoning was affirmed in *Younger*, in which the Court rejected the notion that "the federal courts may give equitable relief, without regard to any showing of bad faith or harassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment."[51]

Other courts facing challenges to state abortion laws have adjudicated requests for injunctions in accordance with these principles. In *Babbitz v. McCann*,[52] a federal district court held that Wisconsin's abortion statute violated the plaintiff's Ninth Amendment rights, but refused to issue an injunction against the stricken statute, stating that there was no showing of exceptional circumstances sufficient to warrant an injunction, and no reason to doubt that the state would fail to vindicate plaintiff's constitutional rights. Only when it became apparent that the state had refused to cease prosecutions under the statute did the district court issue an injunction against its exercise.[53] In *Roe v. Wade*,[54] a federal district court held that an abortion statute of Texas violated the plaintiffs' Ninth Amendment rights, but refused to issue an injunction because it could not find that the statute was enforced in order to discourage protected activities, or to abridge freedom of expression.

Applying these principles to the present case, it is clear that plaintiffs have neither alleged nor shown utilization of the New Jersey abortion statute by state prosecutors for any reason other than in good faith and for the purpose of securing valid convictions thereunder. They have made no allegation that the abortion statute has been used against them in bad faith as an instrument of intimidation or harassment in the exercise of their protected constitutional rights. The allegation that they are chilled in the exercise of First Amendment freedoms is insufficient in itself to support injunctive relief. Moreover, no reasons have been advanced to indicate that state prosecutors will fail to enforce or protect plaintiffs' constitutiona rights as found by this court. Nor are we otherwise led to believe that they will under such circumstance ignore them. Hence, the special circumstances which justify the drastic relief of an injunction have not been shown.

IV. VAGUENESS

Plaintiffs contend that the statutory provisions of §2A:87-1[55] and §45:9-16[56] are unconstitutionally vague, facially and as applied, because they provide insufficient warning to plaintiffs and others of the conditions which justify abortion, and are unevenly applied. §2A:87-1 provides as pertinent hereto:

> "Any person who, maliciously or *without lawful justification*, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor." (Emphasis supplied.)

Plaintiffs specifically challenge the phrase "without lawful justification" as providing inadequate notice of the sphere of conduct prohibited by the statute.

It is basic to due process that:

> "(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (footnote omitted ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"[57]

Nowhere in §87:2A-1 or any legislative history, however, is there a hint of what reasons may constitute "lawful justification" for the termination of pregnancy. "Lawful" is defined in Black's Law Dictionary as: "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law." "Justification" is defined as "maintaining or showing a sufficient reason in court why the defendant did what he is called upon to answer . . . . Just cause or excuse . . . . Just, lawful excuse for act . . . . Reasonable excuse." These definitions do not clarify the statute. Nor do the defendants urge that the language of the statute itself fulfills the specificity requirement of the Fourteenth Amendment to give reasonable

notice of the scope of permissible or prohibited activity. They argue rather that the challenged language, which has remained virtually unaltered since the passage of the statute in 1849, was intentionally retained to provide for continuing judicial interpretation in the light of prevailing conditions and that the New Jersey courts have interpreted the statute so as to eliminate potential vagueness in its scope. Defendants rely additionally upon guidelines formulated by a Committee of County Prosecutors and issued by the Office of the Attorney General in 1967 construing the scope of the phrase "without lawful justification." All County Prosecutors in New Jersey, save for one,[58] agreeded to be bound thereby.

Finally, defendants urge that the present case does not involve a statute which restricts freedom of expression, and is not deserving of the strict judicial scrutiny called for where a chilling effect on First Amendment freedoms may exist.[59]

At the outset, we must reject this last contention. First Amendment freedoms of speech and expression are clearly involved in the present case since the very language of the statute imposes a prohibition on any person who "prescribes or advises or directs" a woman to terminate her pregnancy. New Jersey courts have in fact upheld convictions of individuals under the statute who imparted information concerning the procurement of abortions.[60]

We are not persuaded by the contention that the sweeping language of the statute can be upheld as an expression of legislative intent to place interpretations of the phrase "without lawful justification" in the courts. While the legislature may validly leave the task of determining the scope and contours of broadly worded statutes to the judiciary, which is bound to uphold its constitutionality if at all possible, this is hardly susceptible of accomplishment when the intent or purpose of the statute is left obscure.[61] It is patent, indeed, that the New Jersey Legislature has left undetermined whether the statute was intended as a health and safety measure for the protection of women, as a protection for the lives of unborn children, or both.[62]

We turn now to the decisions of the New Jersey courts to determine whether, as defendants urge, there have been judicial interpretations construing the statute to sufficiently forewarn the plaintiffs of the sphere of activity prohibited by its language. The first New Jersey case involving judicial comment on the phrase "without lawful justification" was *State v. Brandenburg*.[63]

Following his conviction under the statute in that case, the defendant-physician on appeal challenged *inter alia* a charge to the jury at trial that:

> "Lawful justification is used in the sense of necessity. It is a defense that the destruction of the child's life was necessary to save that of the mother, but it should be remembered that necessity of this class must be strictly limited. The right can only be exercised in extremity.'"[64]

The appellant argued that the trial court should have charged that protection of a woman's health and well-being constitute lawful justification under the statute. The appellate court held that there was no error in the charge, particularly since the defense at the trial had been that the abortion was necessary to save the mother's life. It declined to consider whether the protection of the mother's health constituted lawful justification, but did reject the proposition that "so broad a ground as 'well-being' may be considered by a jury as ground for causing a miscarriage."[65]

Judicial consideration of the inclusive sweep of the challenged statutory language occurred again in *Gleitman v. Cosgrove*.[66] Although this was a malpractice action against two physicians who allegedly failed to appraise the mother that birth defects might result from rubella, it became a vehicle for the expression of considerably diverse judicial opinion on what reasons "lawfully" justify abortion. The New Jersey Supreme Court refused to reach the question of whether an abortion, if sought, would have been illegal, but went on to state that:

> "The only justification so far held lawful by our courts is preservation of the mother's life. *State v. Shapiro*, 89 N.J.L. 319 (E & A 1916); *State v. Brandenburg*, 137 N.J.L. 124 (Supp. Ct. 1948). It may well be that when a physician performs an abortion because of a good

> faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime."[67]

Notwithstanding the court's express refusal to consider whether an abortion, if sought, would have been lawfully justified, the signifance of the language cannot be ignored. For it not only approved the ground of necessity to preserve the mother's life as a lawful justification for abortion, but also clearly implied that medical indications as well might justify it. Such judicial expression, whether a holding or merely *dicta*, surely did not serve to illuminate the reasons which constitute lawful justification under the statute, either in performing abortions or imparting knowledge thereof. Chief Justice Weintraub, commenting on the above-quoted statement, observed that:

> "the very suggestion that a question remains as to whether a eugenic abortion is criminal will be quite as forbidding as a flat holding that it is."[68]

At the very least, the language of the court in *Gleitman* implied an opportunity for physicians to utilize their medical judgment in granting abortions, but left wide open the possibility that they could be second-guessed in a judicial forum, to incur the severe penalties of conviction and loss of license.

In the same year that *Gleitman* was decided, guidelines were formulated by the County Prosecutors, interpreting the statutory phrase "without lawful justification" as heretofore noted.[69] They virtually adopted the language of the court in *Gleitman*, stating that abortions would be considered lawfully justified when necessary to preserve the mother's life, or when performed on a good faith determination made in accordance with accepted medical standards that a termination of pregnancy was medically indicated. It is apparent that the Prosecutors relied on the language of the *Gleitman* case as a determinative interpretation of the statute.

Neither the statement of the court in *Gleitman* nor the County Prosecutors' guidelines were further clarified in the New Jersey Supreme Court's recent consideration of *State v. Moretti*.[70] On that appeal from a conviction of conspiracy to commit an

unlawful abortion, the court replied to the appellants' contention that the statute was unconstitutionally vague by stating that:

> "Clearly, a construction of the statute which confined the meaning of the phrase 'lawful justification' to the preservation of the mother's life would avoid any constitutional attack based on vagueness."[71]

It also stated that:

> "(i)t is beyond comprehension that the defendants could have believed that our abortion statute envisioned lawful justification to exist whenever a woman wanted to avoid having a child."[72]

The court did not in any way allude to its language in *Gleitman*, adopted by the Prosecutors of New Jersey, that an abortion may be lawfully justified if medically indicated on the basis of a good faith determination made in accordance with accepted medical standards. Whether the court intended thereby to affirm or reject its earlier language is unclear. Yet the Prosecutors have given no indication of their withdrawal from their position in the 1967 report, despite the more restrictive language in *Moretti*. In fact, several justices of the New Jersey Supreme Court have voiced widely differing opinions regarding the scope of reasons which would lawfully justify abortion under the statute. Justice Francis, concurring in *Gleitman*, argued that necessity to preserve the mother's life is the only lawful justification under the statute, while Chief Justice Weintraub (dissenting in part) and Justice Jacobs (dissenting) stated their belief that rubella provides a lawful justification for the termination of pregnancy. Justice Jacobs additionally noted that termination of pregnancy to preserve the mother's life or health should be considered lawful justification in his observation that:

> "it is well-known that abortions have been and are being performed in good faith by highly qualified physicians in highly reputable hospitals, when necessary to preserve the life *or health* of the mother, or to preclude the quickening of the fetus *in rubella cases and the like.*" (Emphasis supplied.)[73]

On the basis of the foregoing discussion it is clear that the defendant has accurately argued that abortion is lawfully justified at least when necessary to preserve the mother's life; that it "may well be" justified when performed on a good faith determination that accepted medical standards so indicate; and that most New Jersey prosecutors appear to be operating under the assumption that both reasons constitute lawful justification for abortion. This is a frail foundation, however, for the defendant's contention that the statute has thereby been rendered sufficiently specific to conform to the stringent requirements of the Fourteenth Amendment for adequate and reasonable notice of the sphere of activity prohibited by it. All of these arguments serve only to emphasize the absence of judicial interpretation establishing a clear standard by which individuals and prosecutors alike may reasonably determine the lawfulness of conduct under the statute. We are not persuaded that the decisions of the New Jersey courts have provided constitutionally adequate forewarning of the sphere of activity prohibited by the statute as being "without lawful justification". We cannot find proper notice in the language of the statute or in any legislative expression of intent or purpose. Nor can a mere statement of policy issued by the state prosecutors provide the necessary specificity.

The New Jersey statute is unlike that of the District of Columbia which was upheld by the Supreme Court on a challenge of vagueness in *United States v. Vuitch*.[74] The Court there held constitutional a statute prohibiting abortion unless "necessary for the preservation of the mother's life or health", finding that the words "life or health" were sufficiently specific to fulfill the notice requirements of the Fourteenth Amendment. The New Jersey statute is not similar to that statute, either in language or as interpreted by the state courts.

In the absence of judicial interpretation and legislative history or directives providing adequate guidelines for the conduct of those who may be threatened with possible prosecution under §2A:87-1, it cannot be constitutionally sustained. The challenged phrase "without lawful justification" provides not a glimmer of notice to the reader of what he may and may not do.

In the final analysis, plaintiff-physicians who may be threatened with prosecution under the abortion statute can rely only upon their individual judgment, always subject to a judicial

determination that they guess wrongly, and to resulting conviction and loss of license to practice medicine.[74] As Justice Clark has observed:

> "The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion."[75]

We conclude that the New Jersey abortion statute, §2A:87-1, is unconstitutionally vague on its face as applied; that it chills and deters the plaintiff-physicians in the exercise of protected First Amendment activities; and that it violates plaintiff-physicians' rights under the Fourteenth Amendment to freely practice the profession of their choice.

V. RIGHT OF PRIVACY

Plaintiff-physicians further contend that the New Jersey abortion statutes, §§2A:87-1 and 45:9-16, violate their and their patients' rights of privacy in the physician-patient relationship as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments. They urge that a statutory command to withhold medical advice or services to women seeking abortions intrudes unconstitutionally upon an alleged right of women to privacy in determining whether to bear a child, which includes a right "not to have children in the cases where pregnancy can be terminated

in its early stages by means of an induced or therapeutic abortion."[76] It is argued that this right of privacy extends to the quickening period, including at least the first trimester of pregnancy. If women patients are entitled to seek the services of physicians to perform abortions, it follows that the rendition of such services are beyond the reach of the abortion law.

The right of privacy alleged here is grounded upon the fundamental principle that the Constitution protects the right of an individual to control the use and function of his or her body without unreasonable interference from the state. Plaintiffs do not rely on the literal language of any constitutional provision to support their allegations. Rather, they contend that a number of Supreme Court decisions, considered together, have interpreted the Ninth and Fourteenth Amendments,[77] either singly or in combination, to encompass the right of privacy asserted here.

A foundation for this principle may be observed in *Union Pacific Railway Co. v. Botsford*,[78] in which the Court stated:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and ununquestionable authority of law."

The continuing validity of this principle was demonstrated only four years ago in *Terry v. Ohio*,[79] wherein the Supreme Court specifically reaffirmed the above-quoted passage from *Botsford*.

Since that time, the Supreme Court has expanded the *Botsford* principle, interpreting the Ninth and Fourteenth Amendments as having established that the Constitution protects cer-

tain rights relating to marriage, sex, childbearing, child-rearing and education, despite the fact that such rights are not mentioned either in its body or in any of its Amendments.

The first of this line of cases is *Meyer v. Nebraska.*[81] In *Meyer*, the Court struck down, on Fourteenth Amendment grounds, a state statute which sought to support the primacy of the English language by prohibiting the teaching of modern foreign languages to school children below the eighth grade. In discussing the applicability of the Fourteenth Amendment to the issue before it, the Court commented:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. 'No State shall . . . deprive any person of life, liberty, or property, without due process of law.'
>
> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right . . . to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect . . . ."[82]

Two years later, in *Pierce v. Society of Sisters,*[83] the Supreme Court, citing its decision in *Meyer, supra,* read the Fourteenth Amendment as guaranteeing the "liberty of parents and guardians to direct the upbringing and education of children under their control"[84] and vindicated the right of private school at-

tendance despite a state law requiring that students be educated in public schools. In *Skinner v. Oklahoma ex rel. Williamson*,[85] which involved a challenge to an Oklahoma law requiring compulsory sexual sterilization for habitual criminal offenders, a unanimous Court voided the statute for violating the Equal Protection Clause of the Fourteenth Amendment. In so doing, however, the Court addressed itself directly to a "right which is basic to the perpetuation of a race—the right to have offspring."[86] More recently, in *Loving v. Virginia*,[87] the Court noted that "(t)he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and held that a state anti-miscegenation law violated the Due Process Clause of the Fourteenth Amendment by unreasonably interfering with marriage, "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[88]

The existence of a right of privacy received significant support in *Griswold v. Connecticut*.[89] That case resulted from a Connecticut statute which made it a criminal offense for any person either to use or to aid or abet in the use of any drug, medicinal article or instrument for the purpose of preventing conception. The appellants in *Griswold*, respectively the Executive Director and the Medical Director, a physician, of the Planned Parenthood League of Connecticut, provided advice, information and devices to married couples for contraceptive purposes. Their convictions for engaging in the prohibited activities as accessories were upheld by the Connecticut courts. The Supreme Court held the Connecticut statutes unconstitutional as an unreasonable interference with the right of marital privacy. Justice Douglas, for the majority, recognized that the right of marital privacy upon which he rested his opinion is not stated specifically in the Constitution and explained his reasoning in the following language:

> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-22 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition

against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

* * *

We have had many controversies over these penumbral rights of 'privacy and repose.' See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 626, 644; *Public Utilities Comm'n v. Pollack*, 343 U.S. 451; *Monroe v. Pape*, 365 U.S. 167; *Lanza v. New York*, 370 U.S. 139; *Frank v. Maryland*, 359 U.S. 360; *Skinner v. Oklahoma*, 316 U.S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

"The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[90] Notable is the critical significance of Justice Douglas' citation of the Ninth Amendment in his listing of constitutional provisions which mark out rights or zones of privacy through their penumbras and emanations.[91]

The concurring opinion of Justice Goldberg[92] sought to explore and elucidate the right of privacy emanating from the Ninth Amendment. As a starting point in his analysis, Justice Goldberg stated:

"This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. (footnote

omitted) The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[93]

He then proceeded to determine whether the Ninth Amendment was properly invoked in considering the question of a right of privacy, reasoning that:

> "While this Court has had little occasion to interpret the Ninth Amendment, (footnote omitted), (i)t cannot be presumed that any clause in the constitution is intended to be without effect.' *Marbury v. Madison*, 1 Cranch 137, 174. In interpreting the Constitution, 'real effect should be given to all the words it uses.' *Myers v. United States*, 272 U.S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that '(t)he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people.' " (emphasis in original)[94]

In determining which rights are protected against unreasonable state intervention and interference by the Ninth Amendment, Justice Goldberg stated:

"In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . *'Powell v. Alabama*, 287 U.S. 45, 67.'"[95]

The late Justice Harlan concurred in the *Griswold* decision but not in the opinion of the Court. He stated:

"In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *Supra* (367, U.S. 497, 539-555, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."[96]

According to Justice Harlan, Fourteenth Amendment analysis proceeds as follows:

"Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yardstick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on

grounds which follow closely on well-accepted principles and criteria. The new decision must take 'its place in relation to what went before and further (cut) a channel for what is to come.' *Irvine v. California*, 347 U.S. 128, 147 (dissenting opinion)."[97]

Hence *Griswold* and its associated cases establish the following basic principles applicable to the issues presented here:

1. Not all fundamental rights guaranteed by the United States Constitution are mentioned specifically either in its body or in its amendments;

2. A general right of privacy, or a collection of particular zones of privacy, exists in the Constitution, whether derived from the penumbras and emunations of various constitutional provisions or amendments, the Ninth Amendment, the Due Process Clause of

3. In determining which activities deserve constitutional protection, only those that can be termed "fundamental" or "implicit in the concept of ordered liberty" are subsumed under a right or zone of privacy;

4. The constitutional right or zone of privacy has been held to include and protect at least certain activities relating to marriage, sex, contraception, procreation, childrearing and education; and

5. Even if an activity is sufficiently basic to be included within a right of privacy, it is not entitled to freedom from all regulation and control by government.

Applying these principles to the circumstances of the present case, the absence of specific language in the Constitution does not dilute or diminish the contention that there is a right of privacy which includes the right to seek an abortion in the early stages of pregnancy. The scope of interests found to be constitutionally protected by the Supreme Court demonstrates that it views both the sanctity of the individual's person and his relationships within a family as so vital to our free society that they should be ranked as fundamental, or implicit in the concept of ordered liberty. Supreme Court decisions heretofore examined have determined that the individual's person and his freedom to marry, to enjoy privacy in a marriage, to have offspring, to decide not to have offspring by practicing contraception, and to control and direct the education of children, are protected from unreasonable governmental interference.

In the wake of *Griswold* there have been a number of lower court decisions directed to the merits of the right of privacy contentions which have expanded the scope of those protected activities to include a woman's right to choose whether to complete a pregnancy and bear a child.

In *California v. Belous*,[98] the court stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. (citing *Griswold, Loving, Skinner, Pierce, Meyer*, and two California cases) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (citations omitted)."

The court in *Babbitz v. McCann*,[99] found the Ninth Amendment of the Constitution protects a "woman's inherently personal right" to obtain an abortion after analyzing a host of authority, including *Belous, Botsford, Griswold, Loving, Meyer, Pierce* and *Skinner*.

---

80 Cal. Rptr. 354, 458 P.2d 194, 199-290 (1969).

In *Roe v. Wade*,[100] the court struck down the Texas abortion statute as infringing upon "plaintiffs' fundamental right to choose whether to have children," citing *Babbitz, Belous, Griswold*, all *supra*, and *State v. Munson*.[101]

In *Doe v. Scott*,[102] the court reviewed the authorities discussed above and concluded:

> "We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold* . . . We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion."[103]

Accordingly, we are persuaded that the freedom to determine whether to bear a child and to terminate a pregnancy in its early stages is so significantly related to the fundamental individual

and family rights already found to exist in the Constitution that it follows directly in their channel and requires recognition.[104] Whether a constitutional right of privacy in this area is conceptualized as a family right, as in *Griswold*, as a personal and individual right, or as deriving from both sources is of no significance and applies equally to all women regardless of marital status, for the restriction on abortion by the New Jersey statutes immediately involves and interfers with the protected areas of both family and individual freedom.

Hence, we hold that a woman has a constitutional right of privacy cognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages, free from unreasonable interference by the State.

There remains a question of the extent of authority of the state to regulate in this area. While it has long been recognized that constitutional rights are not immune from all governmental regulation,[105] it is insufficient for the state to demonstrate that a restrictive regulatory scheme is motivated merely by some rational purpose. State intrusions into an area of constitutionally protected freedom must be founded on a compelling state interest which overrides the private rights of the individual.[106] Here, as in *California v. Belous*:[107]

> "The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state . . ."

Where such an interest exists, state regulation must be narrowly drawn, and reasonably designed to fulfill its purpose without encroaching unnecessarily upon personal liberty. As was said in *N.A.A.C.P. v. Alabama*:[108]

> "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. (citation omitted) '. . . (T)he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected

freedom.' *Cantwell v. Connecticut*, 310 U.S. 296, 304. ' . . . (E)ven though the governmental purpose be legitilate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488."

The Attorney General and *amici*, supported by briefs and oral argument, defend the statutory restrictions provided in the New Jersey abortion laws on two grounds of purported state interest: the power of the State to regulate conduct inimical to the general welfare, and the concept of the protection of the embryo or fetus. Inevitably there are drawn into issue other areas of conceivable state interest, such as guarding the health and safety of women, the control of sexual behavior, and the promotion of increased population.

There is no question that the State has a rational and compelling interest in safeguarding the health, safety, and lives of its citizens.

Concerning the relatively abstract interest of the State as expressed by the Attorney General in regulating conduct inimical to the general welfare, no authority has been advanced nor any found indicating that a state may sustain legislation alleged to infringe on individual constitutional rights for so amorphous a reason as fostering the general welfare of its citizens. It is clear that the State must show some particular and specific interest which is compelling.

Legislative concern for the lives and health of women was a motivation in the passage of the 1849 abortion statute, which has been altered but little to date. In *State v. Cooper*[109] the court held that:

"The procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently . . . the mere attempt to commit the act is not indictable."

Following hard upon this decision, New Jersey passed the abortion statute.

In *State v. Murphy*,[110] the first case to interpret the 1849 statute, the court stated:

> "The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.
>
> ***
>
> "The offence of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment."

Twenty-three years later the court, in *State v. Gedicke*,[111] cited the above-quoted language with approval and could still note that abortion "in almost every case endangers the life and health of the woman . . ."

However appropriate considerations of health and safety were in 1849 or 1881, they no longer constitute compelling grounds to justify a restrictive statutory scheme in this area. Today it is universally recognized that complicated surgery poses far less threat to the life and health of the patient than did much simpler operations over one hundred years ago. Today it is authoritatively said that abortion in the first trimester of pregnancy is almost seven times safer than carrying the pregnancy to term.[112]

Moreover, the consequence of restrictive abortion legislation is to produce an increased threat to the health, safety and lives of women. It is a matter of common knowledge that if women cannot obtain abortions from licensed physicians in hospitals or clinics, many subject themselves to the notorious "back-street" abortion or attempt self-abortion, both fraught with the myriad possibilities of mutilation, infection, sterility and death.

In such circumstances, we are not persuaded that there is a compelling state interest in safeguarding the health, safety and lives of its female citizens through the New Jersey abortion statutes.

Nor are considerations involving the control of sexual behavior or population growth sufficient to justify the prohibitory abortion laws. The question here is not whether state regulation in this area is reasonable, but whether restrictive abortion legislation is

so compellingly related to achieving the desired goal that interference with a woman's right of privacy is permissible.

The State has already implemented its power to regulate sexual behavior by the enactment of statutes providing criminal sanctions for engaging in the primary activity sought to be regulated, fornication and adultery.[113]

As to the interest of the State in fostering population growth, no substantial let alone compelling reason has been advanced that could override the private right of a woman to seek an abortion early in pregnancy, especially in a densely populated and heavily urbanized state like New Jersey, with its attendant demographic, economic, sociological and ecological problems. Hence, these contentions must also fail.

Finally, we reach the assertion of the Attorney General and *amici* that the State has a compelling interest in preserving the life of the embryo or fetus which justifies the prohibitive abortion legislation. This contention invites judicial resolution of substantial questions of medical, philosophic and religious dimensions as to whether an embryo or fetus is a human being from the moment of conception. Numerous articles, many written by authorities in these fields, have been submitted to us purporting to conclusively settle the multitude of issues raised by this question. As stated by Justice Douglas in *United States v. Vuitch*:-[114]

> "Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.[1] Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case.' *Jordan v. De George*, 341 U.S. 223, 242 (dissenting opinion)."

> "1. 'There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philsophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit the freedom of those not bound by identical religious conviction. Although the moral issue

hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that "The most deadly of all possible sins is the mutilation of a child's spirit." There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood.' The Right to Abortion: A psychiatric View 218-219 (Group for the Advancement of Psychiatry, Vol. 7, Pub. No. 75, 1969)."[115]

We are constrained simply to conclude that the great conflict raised by this issue is beyond the competence of judicial resolution.

It is noteworthy here, however, that the New Jersey Legislature has not afforded the embryo or fetus the rights of a living person. It has never abrogated the common law rule that self-abortion prior to quickening is not a criminal offense.[116] Until the recent decision holding the death penalty unconstitutional in New Jersey[117] a pregnant woman could be executed prior to a quickening,[117a] Moreover, a wrongful death action for a stillborn fetus in not maintainable in New Jersey[118] and a fetus must be born alive to invoke the rights that have been statutorily created for its benefit.[119]

In these circumstances we find ourselves persuaded by and in agreement with the language of the court in *Babbitz v. McCann*-[120] that:

> "Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

* * *

> "it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being . . ."[121]

Nothing that has been said herein precludes the state, under its police powers, from establishing reasonable standards of safety in the conditions under which abortion services may be rendered.[122]

[1] §2A:87-1 provides:

"Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

"If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 15 years, or both."

[2] §45:9-16 provides, in pertinent part:

"The board (State Board of Medical Examiners) may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine or surgery or chiropractic filed in the office of any county clerk in this State under any act of the Legislature, upon proof to the satisfaction of the board that the holder of such license . . . (c) has practiced criminal abortion, or been convicted of the crime of criminal abortion . . . or has pleaded nolo contendere, non vult contendere or non vult to an indictment, information, or complaint alleging the commission of the crime of criminal abortion . . . . Before any license, [ ] shall be suspended or revoked, except in the case of convictions of criminal abortions . . . the accused person shall be furnished with a copy of the complaint and be given a hearing . . . and any person whose license shall be suspended or revoked in accordance with this section shall be deemed an unlicensed person during the period of such suspension or revocation, and as such shall be subject to the penalties hereinafter prescribed for persons who practice medicine and surgery or chiropractic, without first having obtained a license so to do . . . ."

[3] By stipulation of the parties, plaintiffs do not prosecute their action against defendant Newark Beth Israel Medical Center here.

[4] See note 1 *supra*.

[5] §2A:87-2 provides:

"Any person who causes or attempts to cause the miscarriage of a pregnant woman and the woman herself shall be a competent witness, and may be compelled to testify, but the testimony of such witness shall not be used in any prosecution, civil or criminal, against the person so testifying."

[6] *§2A:170-76* provides:

> "Any person who, without just cause, utters or exposes to the view of another, or possesses with intent to utter or expose to the view of another, or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion, or who in any way advertises or aids in advertising the same, or in any manner, whether by recommendation for or against its use or otherwise, gives or causes to be given, or aids in giving any information how or where any such instrument, medicine or other thing may be had, seen, bought or sold, is a disorderly person."

[7] See note [2] *supra*.

[8] *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

[9] *United Public Mine Workers of America v. Mitchell*, 330 U.S. 75, 90-91 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936).

[10] *28 U.S.C.§2201*

[11] *Printing Plate Supply Co. v. Curtis Publishing Co.*, 278 F. Supp. 642, 645 (E.D. Pa. 1968).

[12] *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936; *Kane v. Shulton, Inc.*, 189 F. Supp. 882, 884-85 (D.N.J. 1960).

[13] *28 U.S.C.§2201* provides in pertinent part:

> "*In a case of actural controversy* within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ." (Emphasis supplied.)

[14] *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

[15] *Flast v. Cohen*, 392 U.S. 83, 99 (1968)

[16] 394 U.S. 103 110 (1969).

[17] 318 U.S. 44 (1943). *See Poe v. Ullman*, 367 U.S. 497 (1961).

[18] 314 F. Supp. 32 (D. Minn. 1970), *aff'd.* 402 U.S. 967 (1971).

[19] *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Barrows v. Jackson*, 346 U.S. 249, 257-58 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510, 532-36 (1925); *Truax v. Raich*, 239 U.S. 33, 38-39 (1915).

[20] 392 U.S. 83 (1968).

[21] 346 U.S. 249 (1953).

[22] *Id.* at 257.

[23] *Id.*

[24] 389 U.S. 241 (1967).

[25] 394 U.S. 103 (1969).

[26] *Id.* at 110.

[27] In other three-judge district court cases attacking the constitutionality of state abortion statutes where standing was found, a substantially greater threat of injury to the plaintiffs existed. *See Doe v. Scott*, 321 F.Supp. 1385 (N.D. Ill. 1971), *appeal docketed sub nom. Hanrahan v. Doe*, No. 1522, and *Hefferman v. Doe*, No. 1523, 39 U.S.L.W. 3438 (April 6, 1971), renumbered No. 70-105 and No. 70-106 respectively, 40 U.S.L.W. 3007 (July 13, 1971); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. noted*, 402 U.S. 941 (1971). (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term).

[28] *Younger v. Harris*, 401 U.S. 37, 42 (1971).

[29] No allegation or showing has been made that the women have been authorized to represent their respective organizations here.

[29a] *Crossen v. Breckenridge*, 446 F.2d. 833 (6 Cir. 1971); *Doe v. Dunbar*, 320 F.Supp. 1297 (D. Colo. 1970).

[30] 389 U.S. 241, 248 (1967).

[31] *Id.*

[32] *Gere v. Stanley*, Civ. No. 71-1025 (3 Cir. Dec. 27, 1971); *Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1971); *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965).

[33] *Zwickler v. Koota*, 389 U.S. 241, 249 (1967); *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Reetz v. Bozanich*, 397 U.S. 82, 85-87 (1970); *Reid v. Board of Education*, (2 Cir. Dec. 14, 1971); 40 U.S.L.W. 2410-11 (Jan. 11, 1972).

[34] 397 U.S. 82 (1970).

[35] Civ. No. 18360-2 (W.D. Mo., Sept. 10, 1970); *appeal docketed*, 39 U.S.L.W. 3447 (April 13, 1971). (No. 1402, 1971 Term; renumbered No. 70-89, 1972 Term).

[36] See discussion at 23-27, *infra*.

[36a] *See Ryan v. Specter*, 321 F.Supp. 1109 (E.D. Pa. 1971).

[37] *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

[38] 401 U.S. 37 (1971).

[39] 401 66. (1971).

[40] The other cases decided the same day, note 37 *supra*, illustrate the application of the principles set out in *Younger* and *Samuels*.

[41] Indeed, the Court, in *Younger*, specifically observed:

> "(w)e express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41.

[42] *28 U.S.C. §2283*, which provides:

> "A court of the United States may not grant an injunction *to stay proceedings* in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis supplied.)

[43] *See Perez v. Ledesma*, 401 U.S. 82, 98-130 (opinion of Justice Brennan, concurring in part and dissenting in part); *Askew v. Hargrave*, 401 U.S. 476 (1971).

[44] *Younger v. Harris*, 401 U.S. 37, 43-49 (1971).

[45] *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943).

[46] *Id.*

[47] 380 U.S. 479 (1965).

[48] *Id.* at 482.

[49] *Id.* at 485.

[50] 390 U.S. 611 (1968).

[51] 401 U.S. at 50.

[52] 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

[53] *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970). This injunctive judgment has been vacated and remanded by the Supreme Court, 402 U.S. 903 (1971), for reconsideration in light of *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971). *But see Kennan v. Nichols*, 326 F. Supp. 613 (W.D. Wis. 1971), *aff'd*, 40 U.S. L.W. 3351 (Jan. 25, 1972), in which a temporary restraining order issued by a single federal district court judge against threatened prosecution under the stricken statute was upheld by the Supreme Court.

[54] 314 F. Supp. 1217 (N.D. Tex. 1970), *prob. juris. noted*, 402 U.S. 941 (1971), (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term).

[55] *See* note 1 *supra*.

[56] *See* note 2 *supra*.

[57] *Lanzetta v. New Jersey*, 305 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

[58] The Prosecutor of Middlesex County declined to adhere to the Report.

[59] *N. J. I.C.P. v. Button*, 371 U.S. 415 (1963); *see Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

[60] *State v. Ellrich*, 10 N.J. 146, 89 A2d 685 (1952); *State v. Murphy*, 27 N.J.L. 112 (Sup. Ct. 1858).

[61] In fact, shadows have been cast upon the adequacy of legislative directives and guidelines for judicial interpretation of this statute. See opinions of Chief Justice Weintraub in *State v. Morris*, 52 N.J. 182, 195, 244 A2d 199, ——— (1968) (concurring); *State v. Baird*, 50 N.J. 376, 382-83, 235 A2d 673, ——— (1967) (concurring); *Gleitman v. Cosgrove*, 49 N.J. 22, 57-58, 227 A2d 689, ——— (1967) (dissenting in part); and the opinion of Justice Francis in *Gleitman v. Cosgrove*, *supra*, at 40, 48 (concurring).

[62] *See Gleitman v. Cosgrove*, 49 N.J. 22, 227 A2d 689 (1967); *State v. Gedicke*, 43 N.J.L. 86 (Sup. Ct. 1881); *State v. Murphy*, 27 N.J.L. (Sup. Ct. 1858).

[63] 137 N.J.L. 124, 58 A2d 709 (Sup. Ct. 1948).

[64] *Id.* at 126

[65] *Id.* at 127.

[66] 49 N.J. 22, 227 A2d 689 (1967).

[67] *Id.* at 31.

[68] *Id.* at 56 (dissenting in part).

[69] *See* p. 22, *supra.*

[70] 52 N.J. 182, 244 A2d 499 (1968).

[71] *Id.* at 191.

[72] *Id.* at 194.

[73] *Gleitman v. Cosgrove*, 49 N.J. 22, 52-53, 227 A.2d 689, —— (1967); *Sanitary Vendors, Inc. v. Byrne*, 72 N.J. Super. 276, 287, 178 A.2d 259, —— (1962).

[74] 402 U.S. 62 (1967).

[74a] *See* opinion of Justice Douglass in *United States v. Vuitch* in which he stated:

> "Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words . . . (of the statutory code) . . . become free-wheeling concepts, too easily taking on meaning from the juror's predilictions or religious prejudices." 402 U.S. at 80 (dissenting in part).

[75] Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA L. REV. 1, 7 (1969).

[76] Brief for Plaintiff at 62.

[77] The Ninth Amendment provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[78] 141 U.S. 250, 251 (1891).

[79] 392 U.S. 1 (1968).

[80] *Botsford* was a negligence action which posed the question of a federal court's authority to order a plaintiff to submit to a physical examination prior to trial. The Supreme Court held that the federal courts lacked such power in the absence of congressional authority. It might be argued that little reliance should be placed upon the principle extracted from *Botsford* since 1) it evolved from, and should be limited to, a tort context, and 2) the adoption of the Federal Rules of Civil Procedure robbed the ultimate holding of the case of any effect. *Seo Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

Such an argument is not persuasive, however, in light of the reaffirmance of the *Botsford* principle by the *Terry* Court. *Terry* involved the propriety of a stop-and-frisk search of an individual conducted by a policeman whose suspicions had been aroused. The recent restatement of the *Botsford* principle in the context of a Fourth Amendment case clearly establishes that the principle is very much alive and is not limited to tort actions.

[81] 262 U.S. 390 (1923).

[82] *Id.* at 399-400

[83] 268 U.S. 510 (1925).

Id. at 534-35.

[85] 316 U.S. 535 (1942).

[86] *Id.* at 536.

[87] 388 U.S. 1 (1967).

[88] *Id.* at 12.

[89] 381 U.S. 479 (1956).

[90] *Id.* at 484-85.

[91] The *Griswold* decision itself demonstrates the evolution and maturation of the constitutional principles relating to privacy and due process. Four years prior to *Griswold*, The same Connecticut statutes were challenged on identical constitutional grounds in *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961). The distinguishing factor between the two cases was that *Griswold* involved a review of a state criminal conviction, whereas *Poe* reached the Court on a complaint seeking declaratory relief based upon potential state prosecution. The *Poe* majority found the declaratory judgment issue non-justiciable. However, it is interesting to note that Justices Douglas and Harlan dissented in *Poe* and discussed the merits of the constitutional claims urged by plaintiffs. In their dissents can be viewed the developing theories of privacy and due process which later formed the basis for the resolution of *Griswold*.

[92] Justice Goldberg wrote for himself, Chief Justice Warren and Justice Brennan.

[93] 381 U.S. at 488.

[94] *Id.* at 490-92.

[95] *Id.* at 493.

[96] 381 U.S. at 500.

[97] Poe v. Ullman, 367 U.S. 497, 541 (1961) (dissenting).

[98] 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

[99] 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

[100] 304 F.Supp. 1211, 1222 (N.D. Tex. 1970), *prob. juris. noted*, 402 U.S. 941 (1971), (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term).

[101] Memorandum decision S. Dak. Cir. Ct., Pennington County, April 6, 1970.

[102] 321 F.Supp. 1385 (N.D. Ill. 1971), *appeal docketed sub nom. Hanrahan v. Doe*, No. 1522, and *Heffernan v. Doe*, No. 1523, 39 U.S.L.W. 3438 (April 6, 1971), renumbered No. 70-105 and No. 70-106 respectively, 40 U.S.L.W. 3007 (July 13, 1971).

[103] 321 F.Supp. at 1389-90.

[104] *See* Editorial, *Anti-Abortion Laws - As to Their Legality and Morality*, 95 N.J. LAW J. 4 (Jan. 13, 1971).

> For the major cases finding no right of privacy, *see Corkey v. Edwards*, 322 F.Supp. 1248 (W.D. N.C. 1971); *Steinberg v. Brown*, 321 F.Supp. 741 (N.D. Ohio 1970); and *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3217 (Dec. 8, 1970), (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

[105] *Schenck v. United States*, 249 U.S. 47 (1919); *Reynolds v. United States*, 98 U.S. 145 (1878). *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

[106] As Justice Goldberg stated in his concurring opinion in *Griswold:*

> "'In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy.'" (citation omitted. 381 U.S. 479, 497.

See Shapiro v. Thompson, 394 U.S. 618 (1969).

[107] 80 Cal. Rptr. 354, 360, 458 P.2d 194, 200 (1969).

[108] 377 U.S. 288, 307-308 (1964).

[109] 22 N.J.L. 52, 58 (Sup. Ct. 1849). At the foot of the opinion the Reporter noted, "This decision induced the legislature to amend the criminal code, so as to make the offence in question a crime." 22 N.J.L. at 58.

[110] 27 N.J.L. 112, 114-15 (Sup. Ct. 1858).

[111] 43 N.J.L. 86, 96 (Sup. Ct. 1881).

[112] Tietze,*Mortality with Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (1969):

> "*Maternal Mortality* from complications of, or associated with, pregnancy, childbirth, and the puerperium, *excluding induced abortion: 20 deaths per 100,000 pregnancies*. This rate corresponds to the current level of maternal mortality in the white population in the United States. Official statistics of maternal mortality in the United States are based only on deaths attributed to complications of pregnancy, childbirth, and the puerperium. Thus defined, the rate of maternal mortality, excluding abortion, was 18 per 100,000 live births in 1964-66.
>
> * * *
>
> "*Mortality* associated with *legal abortions* performed in hospitals at an early stage of gestation: *3 deaths per 100,000 abortions*, based on current statistics from eastern Europe . . ." (Emphasis in Original).

[113] N.J. STAT. ANN. 2A:88-1 (Adultery) and 2A:110-1 (Fornication).

[114] 402 U.S. 62 (1971).

[115] 402 U.S. at 78-79. *See* 402 U.S. 79 n. 2 (dissenting in part).

[116] *In Re Vince*, 2 N.J. 443, 450, 67 A.2d 141, ____(1949); *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

[117] *State v. Funicello*, Crim. No. A-66-1971 (Sup. Ct. N.J., Jan. 17, 1972).

[117a] *State v. Cooper*, 22 N.J.L. 52, 57 (Sup. Ct. 1849).

[118] *Graf v. Taggert*, 43 N.J. 303, 204 A.2d 140 (1964). See the recent decision in *Chrisaforeorgis v. Brandenberg* (Ct. App., Ill., Jan 28, 1972), 40 U.S.L.S. 2503 (Feb. 8, 1972), in which the court held that a 36-week-old fetus is not a person for the purpose of recovery under the Wrongful Death Act of Illinois.

[119] *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 197 (1960).

[120] 310 F.Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970).

[121] *Id.* at 301.

[122] As in other states where abortion is permitted, e.g., N.Y. Penal Law §125.05(3) (McKinney Supp. 1970), amending §105.05(3) (McKinney 1967).

VI. CONCLUSION

Young Women's Christian Association of Princeton, New Jersey, et al. v. Kugler, Civ. No. 264-70:

The motion for summary judgment on the petition of plaintiff-physicians for declaratory relief that N.J.S.A. §2A:87-1 is unconstitutionally vague and that N.J.S.A. §2A:87-1 and §45:9-16 violate plaintiff-physicians' and their women patients' right to privacy in the physician-patient relationship is granted;

The prayer for injunctive relief is denied;

The prayers of plaintiff-physicians Sherwin H. Raymond, M.D., and Ralph Dean Cavalli, M.D., for expungement of their criminal records resulting from convictions under the New Jersey abortion statute, and the return of their medical licenses, verging as they do on injunctive relief, are denied.

The motion of the Attorney General to dismiss the complaint is denied as to plaintiff-physicians and granted as to all plaintiffs.

Abramowitz, et al. v. Kugler, et al., Civ. No. 431-70:

The motion of the Attorney General to dismiss the complaint is granted.

Each party shall bear its own costs. Plaintiffs in *Young Women's Christian Association of Princeton, New Jersey, et al. v. Kugler*, shall submit an appropriate order on notice to the other parties.

GARTH, J., concurring in part, dissenting in part:

I concur with the majority with respect to Points I (Standing), II (Abstention) and III (Injunction). However, I disagree with the conclusion reached in the majority opinion with respect to Point IV (Vagueness) and Point V (Right of Privacy).

The United States Supreme Court in *United States v. Vuitch*, 402 U.S. 62 (1971) in reversing the trial court,[1] which contains the phrase, "necessary for the preservation of the mother's life or health" was not unconstitutionally vague.

While it is true that the New Jersey statute speaks in terms of "without lawful justification", and to that extent differs from the District of Columbia statute, the Supreme Court of New Jersey has held that the saving or preservation of the mother's life constitutes lawful justification. *State v. Brandenburg*, 137 N.J.L. 124 58 A2d 709 (1948). The New Jersey abortion statute does not outlaw all abortions, but only those which are not necessary to preserve the mother's life. This is virtually the same statutory language upheld as constitutional in *Vuitch*. See also: dissenting opinion, *State v. Barquet*, No. 41,596, (Sup. Ct. Fla., filed Feb. 14, 1972).

It is argued by the majority that the differing views of the members of the New Jersey Supreme Court as expressed in its subsequent opinions may leave room for a broader definition of the term "(un)lawful justification" and that ". . . in some other case where the facts required it, . . . (the Supreme Court of New Jersey) might be called upon to determine the specific limits of the statutory exception for abortions performed with lawful justification . . .". *State v. Moretti*, 52 N.J. 182, 244 A2d 499, 505 (1968). In my view however, this latter expression does not detract from nor dilute the status of the law of New Jersey as it exists today, which equates "lawful justification" with "preservation of the mother's life". Whether or not there are other circumstances which might in time cause a re-definition or expansion of "lawful justification" should not concern us in our instant task. Suffice it to say, if New Jersey's law, as interpreted by its highest court, is to the effect that only one exception exists for the commission of abortion, then it is to that statutory concept, as so defined, that this court should address itself.

As Mr. Justice White stated in his concurring opinion in

Vuitch (402 U.S. at 73):

> "The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal."

Having found no distinguishing characteristic between the New Jersey abortion statute as interpreted by the Supreme Court of New Jersey, and the statute held constitutionally definite by the United States Supreme Court in *Vuitch, supra,* which latter decision must control our decision here, I must respectfully dissent from the conclusion reached by the majority. This, of course, is not to say that I would have reached the same result, absent the *Vuitch* pronouncement.

With respect to Point V of the majority opinion (Right of Privacy), I agree generally that there is a fundamental right in a married woman to determine whether or not to bear a child, once conception has occurred. I reach that conclusion by an analysis that differs somewhat from the analysis projected in the majority opinion. As I see it, one must distinguish between the two lines of precedents which form the basis for the argument advanced by the plaintiffs to the effect that the New Jersey abortion statutes[2] violate their fundamental rights of marital and family privacy. The one precendential line is representated by *Griswold v. Connecticut,* 381 U.S. 479 (1965 (fundamental right of *marital* privacy); the other precedential line leads to a fundamental right of *family* privacy through the teaching of *Loving v. Virginia,* 388 U.S. 1 (1967); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); and *Meyer v. Nebraska,* 262 U.S. 390 (1923).

The case of *Griswold v. Connecticut, supra,* has been relied upon in large part to support the contention that a woman has the fundamental right not to bear a child. I do not agree that *Griswold* is authority for that proposition. *Griswold* held that a state statute prohibiting the use of contraceptives violated the right of marital privacy. In the *Griswold* majority opinion, Mr. Justice Douglas maintained that this right, while not set forth specifically in any one amendment, was included within the penumbra of guarantees of the Bill of Rights. As Mr. Justice Douglas explained:

> ". . .(The) specific guarantees in the Bill of Rights have penumbras, formed by emanantions from those guarantees that help give them life and substance (citation omitted). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its self-incriminating clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" 381 U.S. at 484.[3]

In a concurring opinion, Mr. Justice Goldberg, joined by Mr. Chief Justice Warren and Mr. Justice Brennan, affirmed the reasoning embodied in the majority opinion, but emphasized the conceptual relevance of the Ninth Amendment. The opinion noted that the language and history of the Ninth Amendment indicate that "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[4]

The obvious question is whether the right of marital privacy recognized in *Griswold* is broad enough to encompass the right of a married woman to have an abortion. The Supreme Court found in *Griswold* that a statute forbidding the use of contraceptives had a "maximum destructive impact"[5] upon the marital relationship. The use of contraceptive devices, therefore, was left to the discretion of married couples. The *Griswold* opinion implicitly recognizes that married couples have a right to regulate the size of their family prior to conception. Is there a valid reason why this right should not be extended to the post-conception situation as well? This question was raised by Mr. Justice Clark:

> '. . . abortion falls within the sensitive area of privacy — the marital relation. One of the basic values of this privacy is birth control, as evidenced by the Griswold decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?'[6]

I maintain that the language in *Griswold* does not lend itself to such an expansive reading. I am mindful of the varied and broad readings given to *Griswold* by other courts. *See*, e.g., *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971); *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Georgia 1970), *appeal docketed*, No. 971, 39 U.S.L.W. 3227 (U.S. Nov. 14, 1970); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Texas 1970), *appeal docketed*, No. 808, 39 U.S.L.W. 3229 (U.S. Oct. 6, 1970); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970), *appeal dismissed*, No. 297, 39 U.S.L.W. 3144 (U.S. Oct. 12, 1970, *appeal docketed*, No. 297, 39 U.S.L.W. 3362 (U.S. Feb. 16, 1971); *People v. Belous*, 71 Cal. 2d 954, 458 p. 2d 194, *cert. denied*, 397 U.S. 915 (1970); *But see Corkey v. Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971); *Steinberg v. Brown*, 321 F. Supp. 741 (M.D. Ohio 1970); and *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, No. 1010, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970). I cannot agree with the sweeping generalizations which seek to expand the *Griswold* factual context and holding beyond recognition. In *Griswold*, the majority focused on the sanctity of the marital home and the privacies of married life. The

Court struck down an anti-contraceptive statute because it permitted the state to intrude upon "the sacred precincts of marital bedrooms."[7] The Court observed:

> "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affaris, or social conditions. This law, however, operates directly on *an intimate relation of husband and wife . . .*"[8] *(emphasis supplied)*

The import of the *Griswold* decision is that private, consensual, marital relations are protected from unwarranted state regulation. *Cotner v. Henry*, 394 F. 2d 873 (7th Cir. 1968); See also *Baird v. Eisentadt*, 429 F. 2d (5th Cir. 1970); *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (N.D. Cal. 1970). But there is no discussion in *Griswold* of a "fundamental right" which can be exercised outside of the marital bedroom, weeks or months after a child is conceived. I would therefore hold that the right of a marital privacy, as defined in *Griswold*, is not broad enough to encompass the right of a married woman to determine whether or not to bear a child once conception has occurred.

This analysis, however, does not stop with *Griswold*. While I have declined to stretch *Griswold* beyond its logical reach, I am aware that other expressions of the Supreme Court may be read as leading to the fundamental right asserted by plaintiffs. This right, if found, however, has its genesis in a *family* privacy context rather than in the *Griswold* context. The Supreme Court has previously established the principle that the states may not make unwarranted inroads into areas of personal or family autonomy. Thus, in *Loving v. Virginia*, *supra*, the Supreme Court noted that 'the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[9] See also *United States v. Nation*, 9 USCMA 724, 26 CMR 504 (1958).

In *Skinner v. Oklahoma*, *supra*, the Supreme Court struck down a state statute providing for the sterilization of "habitual criminals." The Court observed that it was dealing "with legislation which involves one of the basic civil right of man. Marriage and procreation are fundamental to the very existence

and survival of the race."[10]

The Supreme Court has also acknowledged the existence of certain fundamental rights associated with the family, *Pierce v. Society of Sisters, supra,* and *Meyer v. Nebraska, supra.* In *Pierce* the Court reviewed an Oregon statute which required parents to send their children to public schools. The statute, in effect, prevented parents from enrolling their children in private schools or academies. The Court concluded that the act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[11] The same principle was stressed in *Meyer, supra,* where the Court invalidated a state law prohibiting the teaching of foreign languages to children who had not passed the eighth grade. The Court maintained that the word "liberty" in the Due Process Clause included the freedom "to marry, establish a home and bring up children."[12]

The standard that emerges from these cases is clear. A fundamental right is protected by the Constitution unless the state has a compelling interest which outweighs this right. *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969); *Griswold v. Connecticut, supra,*[13] This standard requires a two-step operation: the court must first determine whether the right asserted by the individual is a *fundamental right;* if the court answers this question in the affirmative, it must then decide whether there is a compelling state interest which outweighs this right.

I emphasize that the fundamental rights doctrine is not designed to open the door to the subjective views of individual judges. The courts are directed to recognize only those rights which are rooted in the 'traditions and (collective) conscience of our people." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934); *Griswold v. Connecticut, supra,* at 493.

Certainly, the fundamental rights heretofore recognized by the Supreme Court have roots in our culture and traditions. The right to marry[14] and the right to procreate[15] are not the products of popular movements. They are threads woven into the fabric of our society. And the right of parents to make determinations about their children's education or religious training is basic to the family structure. These are rights which are firmly established. The right to travel, recognized by the Supreme Court in *United States v. Guest,* 383 U.S. 745 (1966) is not the product

of judicial whim. Its roots antedate the Constitution.[17] The right of private association, also sustained by the Supreme Court,[18] is fundamental to our democratic society.

Mr. Justice Holmes repeatedly criticized a subjective, fundamental rights approach to Constitutional doctrine. In a series of dissenting opinions,[19] he maintained that a court should read into the Constitution conceptions of public policy which the court happened to entertain.[20] The Holmesian view has won wide acceptance, and the states are now granted wide latitude to experiment with social economic programs.

However, this grant does not permit the state to experiment with basic rights, rooted in our culture and *traditions*. As Mr. Justice Goldberg said in *Pointer v. Texas*, 380 U.S. 400, 413, (1956), ". . . I quite agree with Mr. Justice Brandeis that . . . 'a . . .State may . . . serve as a labortory; and try novel social and economic experiments . . . . I do not beleive that this includes the power to experiment with the fundamental liberties of citizens . . .'" The Supreme Court has since reaffirmed its desire to protect personal and family rights which are based on more than contemporary social or economic viewpoints. See *Loving v. Virginia, supra; Shapiro v Thompson, supra.*

The right of family privacy lies at the base of our social and cultural insitutions. The Supreme Court has recognized the right to establish a home and bring up children in *Pierce, supra,* and *Meyer, supra.* These decision "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

If I am correct in my reading of these precendents and of their teachings, then it would appear that the right of family life or privacy which lies at the base of our social, traditional and cultural institutions, must of necessity result in a concomitant fundamental right of a married couple to determine the scope, dimension and extent of their family unity. While it is true that no direct authority has extended the family privacy concept to this point, I feet that it is a logical extension of the Supreme Court pronouncements in this area.

I do not see how recognition can be given to the rights previously accorded to home establishment, rearing and education of children, without acknowledging the impressive sociological, economic and educational effect that family size has

upon these considerations. A decision to bear a child, hence to add to the family unit, inevitably affects all facets of family life and each and every member of the family.

If, as discussed, there exist fundamental rights pertaining to family life and privacy, I can find no basis nor reason for restricting those rights in this most vital and threshold aspect. Accordingly, I would hold that, subject to state interest, there is a fundamental right in a married woman[21] to determine whether or not to bear a child (thereby adding to the family unit or not, as the case may be) once conception has occurred.

I therefore reach the same conclusion as the majority, but predicated upon a "family right" analysis rather than on an analysis which would expand *Griswold* to what I regard would be impermissible limits. That distinction, of course, would restrict to some extent the scope of fundamental right which I would recognize. It is with respect to the latter half of the equation (the nature and extent of the state interest necessary to justify an invasion of this fundamental right, *Corkey v. Edwards, supra.*) that I part company with the majority.

Certainly, the courts have been watchful to prevent unwarranted intrusions upon fundamental personal liberties. But even First Amendment rights are not considered absolute.[22] This point is illustrated in *Reynolds v. United States*, 98 U.S. 145 (1878), which held that a clan or colony may not permit polygamy even though this practice accords with the religious beliefs of its members. The religious practice[23] review in *Reynolds* was in no way frivolous. It was clear that the members of the Church of Jesus Christ of Latter-Day Saints believed that failure or refusal to practice polygamy would result in "damnation in the life to come."[24] But fundamental personal liberties must give way where there are compelling state interests. The Supreme Court touched upon this problem in *Reynolds* when it asked:

> "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn hersself upon the funeral pile (sic) of her dead husband, would it be beyond the power of the

civil government to prevent her carrying her belief into practice?"[25]

I hold that the state has such a compelling interest in the preservation of life, including fetal life,[26] that even the fundamental right which I have acknowledged must be subordinated to that state interest.[27]

It must be remembered that the fundamental right with which we are concerned can only be exercised by destroying potential life. See *Corkey v. Edwards, supra.* The interests of family privacy or convenience no matter how forcefully argued and no matter how vital, cannot be elevated over the right to live. As one Court has observed, "Protection of life has traditionally been one of the first duties owed by a state to its people.[28]

Even in the first few weeks of pregnancy, the embryo[29] shows unmistakable signs of life. I realize that some courts have found it helpful to use terms such as "quickening" or "trimester" in evaluating fetal rights. See *Babbitz v. McCann, supra; Doe v. Scott, supra.* Older cases generally used the work "quickening" and "viability" to chart fetal development. According to Black's Law Dictionary, "quickening" is the first motion of the fetus which is felt by the mother. Quickening occurs in the middle of the term pregnancy, usually in the last part of the fifth month. But the moment of quickening varies with each women, and this makes it an unreliable measuring device. An unborn child is said to be "viable" when it is capable of existence apart from its mother.[30] Viability also does not occur on a fixed date. In fact, advances in medical technology keep pushing the date of viability further back into the early months of pregnancy.

I do not find these concepts helpful in adjudicating the competing interests of the mother and the fetus. In fact, I fail to see how sound constitutional doctrine can be based on artificial timelines. I view fetal life as a continuous growth process without the qualitative changes suggested by terms such as quickening or viability.

I do not imply that fetal life is equivalent in every sense to "human life." I maintain only that the state's interest in preserving fetal life outweighs the interest of the mother and the family unit. This view is consistent with the policy expressed in three decisions by the New Jersey Supreme Court. In *Raleigh Fitkin-*

Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A. 2d 537, *cert. denied*, 377 U.S. 985 (1964), a pregnant woman refused, on religious grounds, to submit to a blood transfusion. There was sufficient evidence to indicate that at some point in the pregnancy she would hemorrhage severely and that both she and the unborn child would die unless a blood transfusion was administered. Finding some support in previous cases, the court held:

> "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time."[31]

A similar conflict was raised in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A. 2d 689, (1967), when plaintiff-family, brought a malpractice action against doctors who allegedly failed to inform them that their child could be defective when born. Plaintiffs maintained that the failure to give the warning prevented the woman from procuring an abortion.

In affirming the dismissal of the complaint, the court observed:

> "The right to life is inalienable in our society . . ..
>
> We are not faced here with the necessity of balancing the mother's life against that of the child . . .. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. (citations omitted).
>
> Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of the child to live is greater than and precludes their right not to endure emotional and financial injury."[32]

The New Jersey Supreme Court reaffirmed its interest in preserving life in *John F. Kennedy Memorial Hospital v. Dolores Heston & Jane Heston*, 58 N.J. 576 (1971). In that case, Dolores Heston, a twenty-two year old Jehovah's Witness was injured severely in an automobile accident. For religious reasons, Miss Heston's mother insisted that a blood transfusion not be administered and signed a release of liability for the hospital and medical personnel. The hospital then made application to a state court judge for the appointment of a guardian for Miss Heston. After a hearing, the court appointed a guardian with authority to consent to blood transfusions. Surgery was performed at the hospital and blood administered. Following the operation, the defendants moved to vacate the order, but the court declined to grant the motion.

On appeal the Supreme Court of New Jersey held that there was no consititutional right to choose to die. The court found that "the interest of the hospital and its staff as well as the state's interest in life, warranted the tranfusion of blood under the circumstances of this case."[33]

As I have previously made evident, "the State's interest in life" is not confined or restricted to that "life" after birth. The State's interest in protecting and preserving life as I view it commences at the moment of conception. "Whatever the entity is, the State has chosen to protect its very existence . . ." *Corkey v. Edwards, supra*, at 1253. In this respect I am in agreement with the rational of *Corkey v. Edwards, supra*, and with the dissent of Judge Campbell in *Doe v. Scott, supra*.

Whatever may be the merits of the sociological, economic and moral arguments advanced by the plaintiffs as a basis for our holding otherwise, it would appear to me that these arguments and the data supporting them are more appropriate for a legislative rather than a judicial forum.

Accordingly, I must respectfully dissent from the conclusions reached by the majority of this Court. I would hold the New Jersey abortion statute to be constitutional for the reasons hereinabove expressed.

LEONARD I. GARTH
United States District Court

[1] D.C. Code Ann. §22-201: "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as *necessary for the preservation of the mother's life or health* and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years . . .". (emphasis supplied)

[2] N.J.S. 2A: 87-1)
2A: 87-2)
2A: 170-76)
45: 9-16)
45: 10-9)

[3] Mr. Justice Steward dissented on the ground that there was nothing in these amendments which gave the Court authority to invalidate the Connecticut law.

[4] Griswold v. Connecticut, *supra*, at 488.

[5] *Id.* at 485

[6] Clarke, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola L. Rev. 1 (1969).

[7] Griswold v. Connecticut, *supra*, at 485.

[8] *Id.* at 482.

[9] 388 U.S. at 12. The Court held that a Virginia anti-miscegenation statute violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. The opinion was not based solely on recognition of vital personal rights. The presence of indivious racial discrimination was also a factor. As the Court stated, "To deny this fundamental freedom (marriage) on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all of the State's citizens of liberty without due process of law." 388 U.S. at 12.

[10] Skinner v. Oklahoma, *supra*, at 541.

[11] Pierce v. Society of Sisters, *supra*, at 534, 535.

[12] Meyer v. Nebraska, *supra*, at 399.

[13] Where fundamental rights are involved, the courts do not utilize the "rational regulation" standard. It is not sufficient, therefore, to maintain that the state has a rational or reasonable purpose for its policy. As Mr. Justice Goldberg said in Griswold: "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'" (citation omitted) 381 U.S. at 497.

[14] Loving v. Virginia, *supra.*

[15] Skinner v. Oklahoma, *supra.*

[16] Pierce v. Society of Sisters, *supra;* Meyer v. Nebraska, *supra.*

[17] The Constitution does not mention a "right to travel," but the Articles of Confederation provided for free ingress and regress to any from any state. Art. IV, Articles of Confederation.

[18] NAACP v. Alabama, 357 U.S. 449 (1958).

[19] See Tyson & Brother v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

[20] Judge Learned Hand was also an opponent of this doctrine. He once stated: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Hand, The Bill of Rights (1958) at 73.

[21] While my conclusion has been framed in terms of married women as distinct from single women, the thrust of the plaintiffs' argument is that this fundamental right is possessed by all women, married and single.
The fundamental right which I have found stems from Pierce and Meyer, which establish a right of family privacy. The force of precedent and this analysis necessarily restricts this right to married women.
I recognize, however, that the New Jersey abortion statutes make no distinction between married and unmarried women. Thus, in the absence of a compelling state interest (but see discussion infra), I would be obliged to hold these statutes overbroad and therefore unconstitutional. See NAACP v. Alabama, 377 U.S. 288 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

[22] I cite Mr. Justice Holmes' maxim: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919).
Other cases in the First Amendment area illustrate this point. A farmer may be forced to comply with Federal agricultural quotas even though he feels that they are contrary to the teachings of the Holy Scriptures. United v. Kissinger, 250 F. 2d 940 (3rd Cir.), *cert. denied*, 356 U.S. 958 (1958). An individual may be precluded from using poisonous snakes in a religious ritual, State v. Massey, 229 N.C. 734, 51 S.E. 2d 179, appeal dismissed for want of a substantial Federal question, *sub. nom.* Bunn v. North Carolina, 336 U.S. 942 (1949).

[23] The Free Exercise clause is absolute in its protection of religious beliefs, but it does not serve as an absolute bar to state regulation of religious practices.

[24] Reynolds, *supra*, at 161.

[25] Reynolds, *supra*, at 166.

[26] I include in the term "fetal life" all potential life as it may exist from the moment of conception.

[27] There are other possible state interests which might be asserted: population control, health and public safety and regulation of sexual conduct. My holding makes it unnecessary to determine the significance of these interests.

[28] Commonwealth v. Brunelle, No. 83879, at 5 (Middlesex County, Mass. Super. Ct. 1970).

[29] Fetal life may be subdivided into various stages: the zygote, the embryo, and the fetus. According to Dorland's Illustrated Medical Dictionary a zygote is "the cell resulting from the fusion of two gametes; the fertilized ovum. Dorland's defines embryo as "the early or developing product of fertilization of an egg. In the human, the embryo is generally considered to be the developing organizm from one week after conception to the end of the second month." The same source defines a fetus as "the developing young in the human uterus after the end of the second month."

[30] See Woods v. Lancet, 303 N.Y. 349, 357, 102 N.E. 2d 691, 695, (1951).

[31] Raleigh, *supra*, at 423, 201 A. 2d at 538. The court noted that at the time of the action "the child was quick" since the pregnancy was beyond the thirty-second week.

[32] Gleitman v. Cosgrove, *supra*, at 30, 31, 277 A. 2d at 693.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 264-70

MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., JACK L. WARD, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., AND RALPH DEAN CAVALLI, M.D.,

Plaintiffs-Respondents,

v. **NOTICE OF APPEAL**

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendant-Appellant.

TO: Richard I. Samuel, Esq.
c/o Lerner, David & Littenberg, Esqs.
60 Park Place
Newark, New Jersey 07102

Sir:

PLEASE TAKE NOTICE that George F. Kugler, Jr., Attorney General of the State of New Jersey, (by Barry H. Evenchick, Deputy Attorney General), defendant in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Third Circuit from that portion of the judgment of the three-judge federal district court embodied in an order entered on the 10th day of April, 1972, which states:

> 1. that *N.J.S.A.*2A: 87-1 is unconstitutional and void for vagueness and in that it violates plaintiff-

physicians' and their patients' rights to privacy in the physician-patient relationship; and

2. that *N.J.S.A.*2A:87-1 is unconstitutional and void in that it inhibits speech in violation of the First and Fourteenth Amendments to the Constitution; and

3. that insofar as *N.J.S.A.*45:9-16 relates to abortion and violations of *N.J.S.A.*2A:87-1, it violates plaintiff-physicians' and their women patients' rights to privacy in the physician-patient relationship.

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY *PRO SE*
ATTORNEY FOR DEFENDANT-APPELLANT

BY: _____
Barry H. Evenchick
Deputy Attorney General
Chief, Appellate Section

DATED: April 13, 1972

January 31, 1973

Attorney General George F. Kugler, Jr., today made the following statement:

In March of 1972 this office issued a statement as a result of a decision by a three-judge federal court which declared the New Jersey Abortion Law unconstitutional. At that time, I ordered the Appellate Section of the Division of Criminal Justice to file an appeal with the Third Circuit Court of Appeals. That appeal is still pending. We also directed that the prosecutors of the various counties hold in abeyance all prosecutors of the various counties hold in abeyance all prosecutions under the Abortion Statute; and, we further recommended to the prosecutors that any complaint of a criminal abortion by a licensed physician be evaluated in the light of a 1967 policy statement of the New Jersey Prosecutors and the then State Attorney General. That policy statement concluded that the only lawful abortions were those necessary to save the life of the mother or those performed on a good faith determination in accordance with accepted medical standards that a termination of pregnancy was medically indicated. At that time, we had no definitive opinion from the U.S. Supreme Court. We now have such a decision.

As a result of the U.S. Supreme Court's opinion, there are still many unanswered questions. Certains things, however, do appear to be reasonably clear.

1. The Supreme Court has held that a pregnant woman does not have an absolute constitutional right to an abortion on her demand.

2. On the other hand, no state can forbid an abortion during the first trimester where the woman's decision to have an abortion is concurred in by her physician "based upon his best clinical judgment that an abortion is necessary." Whenever in the doctor's best clinical judgment an abortion is indicated, the state can attach no criminal responsibility to his decision or that of the mother.

3. A state can promulgate criminal laws if it chooses to regulate abortion procedures that are reasonably related to medical health for the stage subsequent to approximately the end of the first trimester. The State of New Jersey has no regulatory

statute specifically related to abortion procedures at the present time.

4. For the stage subsequent to viability (which has been defined to mean that period when the fetus can survive outside the mother's womb), the State may, in promoting its interest in the potentiality of human life, if it chooses, regulate and even prohibit abortion except where it is necessary, in appropriate medical judgment, for the preservation of life or health of the mother.

5. The State can regulate those persons who are allowed to perform abortions and may prohibit anyone other than a licensed physician from performing an abortion.

6. No physician is compelled to perform an abortion against his will.

7. No hospital or clinic is compelled to permit abortions to be performed on its premises.

In light of these principles and further in light of the constitutional attack on our statute, it is a difficult judgment for me as Attorney General of the State to determine a responsible course of action in enforcing the law as it exists in New Jersey. However, it is imperative that we prevent the development of illegal abortion mills.

Our present statute, which is on appeal, makes it a crime for any person to perform an abortion without "lawful justification." Under that statute, our prosecutors will be directed to prosecute anyone other than a licensed physician who performs an abortion. Furthermore, the prosecutors will be directed not to prosecute any licensed physician who performs an abortion at the request of a pregnant woman after a good faith determination that in the medical opinion of the physician and in his best clinical judgment an abortion is necessary to preserve the life or health of the mother. The medical judgment by the physician may be exercised in its broadest sense and in the light of all factors: physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.

Our present statute as thus interpreted meets the constitutional test laid down by the recent U.S. Supreme Court decision. Accordingly, I will request the Appellate Section of the Criminal Justice Division to continue its efforts in the Third Circuit to have our present statute upheld.

While I believe that our present statute has constitutional validity, it is necessary and in the best interests of the citizens of this State that a new statute, more comprehensive in its terms, be passed by the Legislature. For example, there are presently no statutes which regulate the medical conditions and circumstances under which abortions may be performed. The U.S. Supreme Court has made it abundantly clear that such regulations may be promulgated. Additionally, our statute does not specifically treat the last months of pregnancy as the U.S. Supreme Court has held the states are empowered to do. Therefore, I am this day writing to the legislative leaders urging them to consider immediate enactment of a constitutionally valid yet more comprehensive abortion statute.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1428

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., JACK L. WARD, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,

v.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, *Appellant*, No. 72-1428;
Plaintiff JANE SPRAGG, and Plaintiff-Intervenor, ROBERT M. LIVINGSTON, *Appellants* in No. 73-1026.
(Dist. of New Jersey — Civil Action No. 264-70)

Submitted Under Third Circuit Rule 12 (6)
March 2, 1973

Before: MARIS and ALDISERT, *Circuit Judges*, and GORBEY, *District Judge*.

JUDGMENT ORDER

After consideration of the contentions presented by appellants, and the recent decisions of *Roe v. Wade*, __U.S.__, and *Doe v. Bolton*, __U.S.__(January 22, 1973), it is

ORDERED AND ADJUDGED that the judgment of the

district court is vacated and the proceedings remanded for reconsideration of the cause, including the issue of standing, and, if reached, the substantive holding, and any implementing relief.

BY THE COURT,
/s/
Circuit Judge
Attest:
/s/

Thomas F. Quinn
Clerk

DATED: March 2, 1973

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., JACK L. WARD, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., AND RALPH DEAN CAVALLI, M.D.,

Civil Action No. 264-70

Plaintiffs,

vs.

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Defendant.

JOANNE ABRAMOWITZ, et al.,

Plaintiffs,

Civil Action No. 431-70

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, LLOYD W. McCORKLE, Commissioner of the State of New Jersey, Department of Institutions and Agencies, NEWARK BETH ISRAEL MEDICAL CENTER, individually

and as representative of all licensed medical facilities,

Defendants.

ORDER

This case having been opened to the Court by the motions for summary judgment of plaintiffs in the respective civil actions, and by the motion to dismiss of defendant, George F. Kugler, Jr., Attorney General of the State of New Jersey, and upon consideration of the briefs, affidavits, exhibits, and arguments presented to the Court, and it appearing that an opinion was filed herein on February 29, 1972 in which FORMAN, C.J. and BARLOW, D.J. concurred, and GARTH, D.J. concurred in part and dissented in part, and for the reasons discussed in the majority opinion;

IT IS ORDERED, on the petition of plaintiff-physicians for declaratory relief:

1. that N.J.S.A. 2A:87-1 is unconstitutional and void for vagueness and in that it violates plaintiff-physicians' and their patients' rights to privacy in the physician-patient relationship; and

2. that N.J.S.A. 2A:87-1 is unconstitutional and void in that it inhibits speech in violation of the First and Fourteenth Amendments to the Constitution; and

3. that insofar as N.J.S.A. 45:9-16 relates to abortion and violations of N.J.S.A. 2A:87-1, it is unconstitutional and void in that it violates plaintiff-physicians' and their women patients' rights to privacy in the physician-patient relationship; and

IT IS FURTHER ORDERED:

4. that the prayer of the plaintiff-physicians for injunctive relief is denied; and

5. that the prayers of plaintiffs Sherwin H. Raymond, M.D. and Ralph Dean Cavalli, M.D. for expungement of their criminal records resulting from conviction under N.J.S.A. 2A:87-1 and the return of their licenses to practice medicine, are denied; and

IT IS FURTHER ORDERED, on the motions of the defendant, Attorney General of the State of New Jersey:

6. that the complaint in *Abramowitz, et al. v. Kugler, et al.*, Civil Action 431-70, is dismissed; and

7. that the complaint in *Young Women's Christian Association of Princeton, New Jersey, et al. v. Kugler*, Civil Action No. 264-70, with respect to plaintiffs Young Women's Christian Association of Princeton, New Jersey, Ann Krasnoff, the New Jersey Branch of the Women's International League for Peace and Freedom, Anne Ivey, Marilyn Ressler, and Esther Frankel, is dismissed; and

8. that a stay of this order pending appeal is denied; and

9. after hearing arguments by counsel for Robert M. Livingston, M.D., and in opposition by counsel for the defendant Attorney General,

IT IS FURTHER ORDERED:

that the application of the said Robert M. Livingston, M.D., of April 7, 1972, for an order to show cause why he should not be permitted to intervene herein, is discharged; and

10. that having been denied intervention in this cause and thereby having no standing herein, the application of Robert M. Livingston, M.D., for an order to show cause why a preliminary injunction and temporary restraining order should not issue, is discharged; and

IT IS FURTHER ORDERED:

11. that each party hereto shall bear its own costs.

DATED: /s/

Phillip Forman, C.J.

APRIL 10, 1972

s/s

George H. Barlow, D. J.

I note disagreement with so much of the above order as is inconsistent with my dissenting opinion in the above case. In view of the majority decision, however, I concur with respect to the denial of stay and the discharge of the Livingston order to show cause.

/s/

Leonard T. Garth, D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
July 24th, 1973

NOT FOR PUBLICATION

Ellen B. Kulka, Esq.
3 Whittier Way
Livingston, N. J. - 07034

Janice Goodman, Esq.
Bellamy, Goodman, Kelly & Ross
36 W. 44th Street
New York City, N. Y. - 10036

Richard I. Samuel, Esq.
60 Park Place
Newark, N. J. - 07102

Rhonda Copelon Schoenbrod, Esq.
Nancy Stearns, Esq.
Center for Constitutional Rights
853 Broadway
New York City, N. Y.

Stephen M. Nagler, Esq.
New Jersey Civil Liberties Union
45 Academy Street
Newark, N. J. - 07102

George F. Kugler, Jr., Esq.
Attorney General of New Jersey
State House Annex
Trenton, N. J. - 08625

Alfred J. Luciani, Esq.
Deputy Attorney General of New Jersey
Division of Criminal Justice
Appellate Section
7 Glenwood Avenue
East Orange, N. J. - 07018 .

RE: YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D. SAMUEL BRESLOW, M.D., JACK L. WARD, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D. v. GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; Civil Action No. 264-70.

OPINION AND ORDER

Mesdames and Messieurs:

A three-judge court, convened pursuant to 28 U.S.C. § 2281, et seq., on February 29th, 1972, filed its opinion in the above-entitled matter granting, inter alia, the plaintiffs' motion for summary judgment and declaring that New Jersey's abortion statute, N.J.S.A. 2A:87-1, and its medical license statute, as it relates to abortion, N.J.S.A. 45-9-16, were unconstitutional. Plaintiffs' demand for injunctive relief was denied.

An order reflecting that holding was filed on April 10th, 1972. On April 14th, 1972, the defendants appealed to the United States Court of Appeals for the Third Circuit. On March 2nd, 1973, by judgment order, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and remanded the proceedings for "reconsideration of the cause, including the issue of standing, and, if reached, the substantive holding, and any implementing relief".

Following the remand of this cause to this Court, the defendant moved for summary judgment. FED. R. CIV. P. 56. That motion, by consent of the parties, was submitted on briefs without oral argument. FED. R. CIV. P. 78.

This Court, pursuant to the direction of the Court of Appeals for the Third Circuit, reconsidered its holding herein, particularly in light of the United States Supreme Court's decisions in *Roe v. Wade*, 409 U.S. 113 (1973) and *Doe v. Bolton*, 409 U.S. 179 (1973). Furthermore, we have considered the defendant's application for summary judgment. From our reconsideration and review, we are satisfied that no modification, amendment or implementation of our opinion or order herein is either appropriate or required. Defendant's motion for summary judgment is denied.

/s/

Philip Forman
United States Circuit Judge

/s/

George H. Barlow
United States District Judge

/s/

Leonard I. Garth
United States District Judge

GHB/ebj

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 264-70

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., AND RALPH DEAN CAVALLI, M.D.,

Plaintiffs

v.

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF NEW JERSEY,

Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby that Y. W.C.A. et al., the plaintiffs abovenamed, hereby appeal to the Supreme Court of the United States from the final order of the three-judge federal court denying injunctive relief entered in this action on the 27th. day of July, 1973.

This appeal is taken pursuant to 28 U.S.C. §1253.

Nadine Taub, Counsel of Plaintiff

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 264-70

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, NEW JERSEY BRANCH OF WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D. JACK L. WARD, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,

Plaintiffs-Respondents,

v.

GEORGE F. KUGLER, JR., ATTORNEY GENERAL OF NEW JERSEY,

Defendant-Appellant.

TO: Janice Goodman, Esq.
Bellamy, Goodman, Kelly & Ross, Esqs.
36 W. 44th Street
New York, New York 10036

Sir:

PLEASE TAKE NOTICE that George F. Kugler, Jr., Attorney General of the State of New Jersey (by Alfred J. Luciani, Deputy Attorney General), defendant in the above-captioned matter, hereby appeals to the United States Court of Appeals for the Third Circuit from the judgment of the three-judge federal district court denying his motion for summary judgment, embodied in an order entered on the 27th day of July 1973, which in essence reaffirms the contents of the Court's previous order entered on April 10, 1973. That order states in pertinent part:

1. That *N.J.S.A.*2A:87-1 is unconstitutional and void for vagueness and in that it violates plaintiff-physicians' and their patients' rights to privacy in the physician-patient relationship; and

2. That *N.J.S.A.*2A:87-1 is unconstitutional and void in that it inhibits speech in violation of the First and Fourteenth Amendments to the Constitution; and

3. That insofar as *N.J.S.A.*45:9-16 relates to abortion and violations of *N.J.S.A.*2A:87-1, it is unconstitutional and void in that it violates plaintiff-physicians' and their women's patients' rights to privacy in the physician-patient relationship.

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY PRO SE

BY:
Alfred J. Luciani
Deputy Attorney General
Division of Criminal Justice

DATED: August 20, 1973

LIBRARY
SUPREME COURT, U. S.
Supreme Court, U. S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

Docket No. 73-838

GEORGE F. KUGLER, JR.,
Attorney General of the State of New Jersey,
Petitioner,

—v.—

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, New Jersey Branch of Women's International League for Peace and Freedom, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,
Respondents.

BRIEF IN OPPOSITION

NADINE TAUB
175 University Avenue
Newark, New Jersey 07102

JANICE GOODMAN
BELLANY, BLANK, GOODMAN, KELLY,
ROSS & STANLEY
36 West 44th Street
New York, New York 10036

Attorneys for Respondents

Of Counsel:

PETER BUCHSBAUM
American Civil Liberties Union
of New Jersey
45 Academy Street
Newark, New Jersey 07102

INDEX

PAGE

Jurisdiction 1

Questions Presented 2

Statement of Facts 4

Procedural History 3

Statement of Facts 4

ARGUMENT:

I. There has been no showing of such imperative public importance as to justify deviation from normal appellate processes pursuant to Supreme Court Rule 20 7

II. The Court below properly exercised jurisdiction 8

A. Standing and Justiciable Controversy 8

B. Comity and Abstention 12

CONCLUSION 14

APPENDIX:

Complaint 1a

Report of the Prosecutors' Committee Concerning the Validity and Enforceability of 2A:87-1 ..... 18a

Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, *Y.W.C.A.* v. *Kugler,* Civ. No. 264-70 and Civ. No. 431-70, April 7, 1972, pages 25-31 .... 21a

PAGE

Letter Brief of Assistant Prosecutor Archibald Kreiger 27a

Letter of Attorney General William F. Hyland to the United States Court of Appeals for the Third Circuit 29a

TABLE OF AUTHORITIES

Cases:

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 13

Doe v. Bolton, 410 U.S. 179 (1973) ..... *passim*

Ex Parte Quinn, 317 U.S. 1 (1942) 8

Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935) 8

Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) 8

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

State v. Haren, 124 N.J. 475, 307 A.2d 644 (Law Div. 1973) 13

State v. Josephs, 79 N.J. Super. 411, 191 A.2d 775 (App. Div. 1963) 6

State v. Slough (Camden Cty. Ind. Nos. 447-65–448-65) 5, 10, 11

United States v. Bankers' Trust Co., 294 U.S. 240 (1935) 8

United States v. United Mine Workers, 330 U.S. 258 (1947) 8

PAGE

Youngstown Co. v. Sawyer, 343 U.S. 579 (1952) 8
Y.W.C.A. et al. v. Kugler, 342 F. Supp. 1048; Docket No. 73-1837 (3 Cir. U.S. Ct. of Appeals) 3, 9

Zwickler v. Koota, 389 U.S. 241 (1967) 13

Constitutional Provisions:

United States Constitution
First Amendment 12, 13
Fourteenth Amendment 13

Federal Statute:

28 U.S.C. §1253 7

State Statutes:

N.J.S.A. 2A:87-1 ..... 1, 5, 6, 10, 11, 12, 13
N.J.S.A. 52:17B-101 et seq. 6
N.J.S.A. 52:17B-109 ..... 6, 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

Docket No. 73-838

GEORGE F. KUGLER, JR.,
Attorney General of the State of New Jersey,
Petitioner,

—v.—

YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF PRINCETON, NEW JERSEY, ANN KRASNOFF, New Jersey Branch of Women's International League for Peace and Freedom, ANNE IVEY, MARILYN RESSLER, ESTHER S. FRANKEL, MICHAEL A. TRICARICO, M.D., MYRA R. ZINKE, M.D., SAMUEL BRESLOW, M.D., ELLIS J. MISCHEL, M.D., SHERWIN H. RAYMOND, M.D., and RALPH DEAN CAVALLI, M.D.,
Respondents.

BRIEF IN OPPOSITION

Jurisdiction

Respondents submit that jurisdiction pursuant to Supreme Court Rule 20 is not warranted in this case. On July 27, 1973, a three-judge district court for the District of New Jersey entered a judgment declaring New Jersey's criminal abortion statute, N.J.S.A. 2A:87-1, void on its face. Petitioner herein then simultaneously appealed to the United States Court of Appeals for the Third Circuit and petitioned this Court for a writ of certiorari pursuant to Supreme Court Rule 20. Petitioner's appeal to the Third Circuit has now been argued and is awaiting decision.

No special considerations now warrant deviation from the normal appellate process in this case. Plaintiffs-respondents' Notice of Appeal to this Court from the denial of injunctive relief below has been dismissed by order of the district court dated January 9, 1974. Hence, the only matter now before this Court is the petition of defendant Kugler which raises precisely those issues now awaiting resolution in the United States Court of Appeals of the Third Circuit.

Questions Presented

I. Does a judgment of a three-judge district court declaring New Jersey's criminal abortion statute unconstitutional entered after this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* present a matter of such imperative public importance as to justify deviation from normal appellate process and to require settlement in this Court?

II. In light of this Court's decisions in *Roe* v. *Wade* and *Doe* v. *Bolton,* did not the court below properly exercise jurisdiction where all doctor plaintiffs alleged interference with their ability to practice their profession according to the highest medical standards, two doctors had been prosecuted and lost their licenses to practice, and none was subject to a pending state prosecution?

Statement of the Case

Procedural History

In order to clarify the present status of the case and to emphasize that this matter does not involve review of an order of the Court of Appeals for the Third Circuit, plaintiffs-respondents set forth a simplified and updated chronology of the proceedings in this matter.

On March 5, 1970, plaintiffs—doctors, women and women's organizations—filed their complaint seeking to have New Jersey's medical licensing statute declared unconstitutional and enjoined. In an opinion dated February 29, 1972, the three-judge district court found that the doctor plaintiffs had standing and declared the challenged statutes unconstitutional, while at the same time denying injunctive relief. The order was entered on April 12, 1972. Defendant Kugler then appealed this judgment to the Court of Appeals for the Third Circuit. While this appeal was pending, the Supreme Court decided *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973), and on March 2, 1973, the Court of Appeals vacated the judgment and remanded the cause for reconsideration. After reconsideration the three-judge district court refiled its original decision and order on July 27, 1973.

From this final order of the three-judge district court, defendant filed a notice of appeal to the Court of Appeals, which appeal he is now pursuing *sub nom. Y.W.C.A. et al.* v. *Kugler*, Docket No. 73-1837. The Third Circuit heard oral argument in the proceeding on February 11, 1974, and the matter is now under advisement.

In addition, plaintiffs filed a notice of appeal to this Court from the July 27, 1973 judgment of the three-judge district court denying an injunction. Prior to the filing of plaintiffs' jurisdictional statement in this Court, defendant filed a petition for certiorari pursuant to Supreme Court Rule 20, providing for review of cases before judgment by a court of appeals only upon a showing of imperative public importance. Subsequently, plaintiffs determined not to pursue their appeal to the Supreme Court, and when they were unable to obtain defendant's consent to the dismissal of their notice of appeal, they proceeded by motion to obtain the dismissal. On January 9, 1974, the district court dismissed plaintiffs' appeal only, leaving defendant's petition still pending. (A true copy of the district court's order dismissing that appeal has already been forwarded to this Court.)

In short, at this time the same matter is pending in the Third Circuit and in this Court, and consequently plaintiffs are simultaneously appellees before the Third Circuit and respondents before this Court.

Statement of Facts

In his petition for certiorari, petitioner asserts that "since 1967, New Jersey has not made it difficult for the physician to decide the best course of professional practice in relation to a plaintiff's pregnancy." (Petition at 7.) This is simply not the case.

At the time this suit was initiated, as a result of past prosecutions and specific threats, plaintiff doctors were uncertain as to their rights and were therefore forced to turn

away patients seeking advice and information about the possibility of obtaining abortions. Dr. Breslow in particular alleged that he had stopped performing abortions after being advised of local prosecutorial policy. Further, two of the plaintiffs had lost their licenses to practice as a result of prosecutions and one was still incarcerated at the time of filing. However, no plaintiff was subject to a pending state prosecution. (See Verified Complaint, Paras. 4, 11, 12; Resp. App. at 2a-7a; 10a-11a; Opinion below at 6a of Pet. App.)

Since that time, two New Jersey physicians, Dr. Robert Livingston and Dr. Bernard Greenspan, were indicted for performing an abortion, conspiracy to perform an abortion, and aiding and abetting in the performance of an abortion. (Bergen County Indictment Nos. S-1548-72 and S-1549-72; see Petition at 7.) Significantly, these indictments, dated August 24, 1972, were returned after entry of the three-judge court's order and after counsel for defendant, in opposing plaintiffs' plea for injunctive relief, had specifically assured the district court that the State had no intention of prosecuting any doctors for performing abortions. (See Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, pages 25-31, Resp. App. at .) Moreover, the State of New Jersey has opposed and continues to oppose the post-conviction relief application of an incarcerated physician's assistant convicted under N.J. S.A. 2A:87-1, New Jersey's criminal abortion statute. (See Letter brief of Assistant Prosecutor Archibald Krieger re *State* v. *Slough*, Resp. App. at 27a.)

It is true that at various times state officials have issued different policy statements regarding the criminal abortion statute. In 1967 the county prosecutors issued a

policy statement which was in effect at the time plaintiff Breslow was deterred from continuing to perform abortions. The same policy was in effect at the time Drs. Livingston and Greenspan were indicted. Subsequent to this Court's ruling in *Roe* and *Doe*, former Attorney General Kugler issued a press release asserting that N.J.S.A. 2A:87-1, the criminal abortion statute, had continuing validity, stating that he would direct the prosecutions of laypersons under it, and suggesting that certain doctors would also be subject to prosecution. (Pet. App. at 64a-77a.)

In January, 1974, William F. Hyland succeeded George F. Kugler, Jr. as Attorney General of the State of New Jersey. Prior to oral argument in the Third Circuit on February 11, 1974, the new attorney general had issued no statement of policy with regard to the enforcement of the challenged statutes. On February 15, 1974 in a letter submitted to the Third Circuit in response to request of the Court at oral argument, Attorney General Hyland indicated his view that N.J.S.A. 2A:87-1, as interpreted by his office, has continuing validity. (Letter of Attorney General Hyland, Resp. App. at 29a.) His letter does not state doctors will not be prosecuted. Nor does it indicate that he or any future attorney general is bound to follow the position there enunciated. Finally, the letter fails to mention any directive—binding or otherwise—to the county prosecutors throughout New Jersey who, in the absence of any affirmative action by the Attorney General, have complete autonomy. N.J.S.A. 52:17B-101 *et seq.*, especially, N.J.S.A. 17B-109; *State* v. *Josephs*, 79 N.J. Super. 411, 191 A.2d 775 (App. Div. 1963). Thus there is no current statement of prosecutorial policy which assures doctors that they are not subject to prosecution.

ARGUMENT

I.

There has been no showing of such imperative public importance as to justify deviation from normal appellate processes pursuant to Supreme Court Rule 20.

Rather than waiting for the decision of the United States Court of Appeals and then requesting review, petitioner now seeks review prior to entry of judgment by the Third Circuit in accordance with Supreme Court Rule 20. However that rule requires a showing of imperative public importance which has not been made here.

At issue is a judgment of a three-judge district court declaring a criminal abortion statute of the Texas type unconstitutional.* The propriety of such a ruling was clearly settled by this Court in *Roe* v. *Wade*, 410 U.S. 113 (1973) and a request at this time for reconsideration of that decision does not present an issue of imperative public importance. Nor is there any other aspect of the case currently before the Court with which the review sought by petitioner could be combined so as to promote prompt settlement of all issues. Unlike *Roe* v. *Wade, supra,* the instant case does not involve a direct appeal by the plaintiff to the Supreme Court from the denial of an injunction pursuant to 28 U.S.C. §1253, and thus the petition must be considered alone.

Following the decisions in *Roe* v. *Wade, supra,* and *Doe* v. *Bolton,* 410 U.S. 179 (1973), the case at bar cannot be said to present any questions of imperative public im-

* New Jersey's statute was explicitly counted among those of the Texas type by this Court in its opinion. *Roe* v. *Wade*, 410 U.S. 118, n. 2.

portance. No significant issue of national impact is raised either with regard to the economy of the entire country, the powers of government or foreign relations. Compare *United States* v. *Bankers' Trust Co.*, 294 U.S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U.S. 110 (1936); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). Instead, if the points here raised are of any interest at all, they are of purely local concern. Hence the exercise of special jurisdiction permitted under Rule 20 is not merited in this case.

II.

The Court below properly exercised jurisdiction.

After this Court's decisions in *Roe* and *Doe*, petitioner is unable to raise any objections going to the merits of the ruling below, and he instead relies on several non-substantive points. These too are without merit, particularly in light of *Roe* and *Doe*.

A. *Standing and Justiciable Controversy*

After this Court's decision on *Doe* v. *Bolton*, *supra*, there can be no question that the doctor plaintiffs had standing to initiate this action. In *Doe*, the Court concluded that:

> [T]he physician-appellants who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with pros-

ecution, for violation of the State's abortion statutes. 410 U.S. at 188.

This holding goes well beyond that necessary to establish standing in the instant case since here two doctor plaintiffs had actually been prosecuted and one had been threatened with prosecution under New Jersey's criminal abortion statute.

Nor have these plaintiffs been deprived of standing by *ad hoc* policy statements of any state officials. Indeed, the initial statement of prosecutorial policy, i.e., the county prosecutors' guidelines issued in 1967, failed to prevent either the threat of prosecution to one plaintiff or the actual indictment of two physicians in 1972.

The subsequent press release of Attorney General Kugler in 1973 similarly failed to deprive plaintiff doctors of standing—not the least because constitutional rights cannot be made to depend on a mere press release. That press release, which purported to reinterpret the New Jersey abortion law so as to render it consistent with *Roe* and *Doe*, contained no concession whatsoever that the New Jersey law is unconstitutional as applied to doctors. Nor did it contain any statement that there shall be *no* prosecutions of doctors. Neither did it contain any acknowledgment that, as the court below found, that portion of the New Jersey law which proscribes advising or directing a woman in obtaining an abortion constitutes an unconstitutional restraint on free speech. *Y.W.C.A.* v. *Kugler*, 342 F. Supp. 1048, 1063. Nor, lastly, in asserting that the law was enforceable against laypersons, did the press release indicate in any way that laypersons who assist doctors in performing abortions and laypersons who engage in counseling and referral to doctors would be

protected from prosecution. Thus, even though the new statutory interpretation put forward by Attorney General Kugler in his press release totally rewrote the New Jersey statute, it did not do away with the statute's interference with the physician's right to practice.

Furthermore, despite petitioner's assertions, it is clear that the 1973 Kugler press release did not bind local county prosecutors so as to provide a uniform interpretation of the law which is consistent with this Court's decisions in *Roe* and *Doe*. This is evidenced by the position taken by the Camden County Prosecutor while the 1973 policy was in effect in opposing the granting of post-conviction relief to a physician's assistant convicted under N.J.S.A. 2A:87-1. The local prosecutor's opposition was based on the grounds that one who assists a licensed physician is immune from prosecution only if that person is a registered nurse or a licensed practical nurse. (Letter of Assistant Prosecutor Archibald Krieger, re *State* v. *Slough,* Resp. App. at 27a.)

Moreover, former Attorney General Kugler obviously lacked the capacity to bind a new attorney general simply by issuing a press release. Thus when the new attorney general, William F. Hyland, took office in January, 1974, plaintiff doctors were left without any assurance whatsoever that they were free to practice without fear of prosecution under N.J.S.A. 2A:87-1. Nor did the letter recently submitted by Attorney General Hyland to the United States Court of Appeals provide sufficient assurance to deprive plaintiff doctors of standing.* That letter

* It should be noted that prior to the Third Circuit's request the new Attorney General had not issued any statement of policy on his own initiative.

is merely a statement of the interpretation of N.J.S.A. 2A:87-1 now current in the office of the Attorney General, giving no indication as to that office's policy with respect to prosecutions.

Like doctors in Texas, doctors in New Jersey are "placed in the posture of dependence on prosecutorial policy or prosecutorial discretion." *Roe* v. *Wade, supra,* at 208, concurring opinion of Chief Justice Burger. The letter of Attorney General Hyland is an unsworn statement which does not purport to bind either the present attorney general, or any future attorney general or any present or future county prosecutor. Inasmuch as the Attorney General does not—and probably cannot—bind himself or his successors, doctors have no assurance that they will not be prosecuted should this or another attorney general adopt a different view of the law. In addition, without any affirmative action on the part of the attorney general, county prosecutors retain complete autonomy, N.J.S.A. 52:17B-109, and thus continue to be free to enforce the abortion statutes as they see fit.* Furthermore, an unsworn statement of an attorney general does little to dispel uncertainty among the doctors of New Jersey as to their rights, particularly in view of the recent indictment of two New Jersey doctors only shortly after a deputy attorney general represented to the three-judge district court that the State had no intention of prosecuting doctors. (See Transcript of Hearing on Motion to Enter Judgment, pp. 25-31, Resp. App. at 21a.)

Nor does the substantive position adopted by the new Attorney General end the controversy by resolving all the

---

* See the discussion *supra* of Letter of Archibald Krieger regarding *State* v. *Slough*.

constitutional infirmities of the New Jersey abortion statute. The statutory interpretation adopted by Attorney General Hyland has essentially the same failings as that adopted by Attorney General Kugler. Like the old Attorney General, the new Attorney General attempts to rewrite the statute totally. Nonetheless, it is apparent that laypersons performing the functions of counseling and referring patients to doctors will still be subject to prosecution in clear violation of the First Amendment. Hence, the ability of doctors to practice their profession is affected by the statute even as reconstrued.

In sum, the doctor plaintiffs herein had standing and presented a justiciable controversy at the time this case was initiated. And nothing has occurred since that time to deprive them of standing or to resolve that controversy.

B. *Comity and Abstention*

Petitioner now urges, four years after the commencement of this suit, that the three-judge district court should have declined to exercise jurisdiction as a "gesture of comity" and as a matter of equitable abstention. These arguments, particularly coming at this late date, totally lack merit.

Petitioner's comity argument is based on the theory that the New Jersey courts stand ready, willing and able to render N.J.S.A. 2A:87-1 constitutional by construing it anew. Yet after the *Roe* and *Doe* decisions, the states were left with a wide range of possible legislation which they could—but did not need to—enact. Reconstruction of a statute in a situation of this complexity must be left to the legislature.

> [A]n attempt to "construe" the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty. *Aptheker* v. *Secretary of State,* 378 U.S. 500, 515 (1964).

Further, contrary to petitioner's contentions, the holding of the lower state court in *State* v. *Haren,* 124 N.J. 475, 307 A.2d 644 (Law Div. 1973) that laypersons have no standing to challenge the constitutionality of the abortion statute indicates that, to say the least, there will be difficulties in obtaining a definitive ruling on N.J.S.A. 2A:87-1 in the New Jersey courts.

But most important, where, as here, fundamental rights under the First and Fourteenth Amendments are at stake the federal courts are under an obligation to respect the plaintiffs' choice of forum. *Zwickler* v. *Koota,* 389 U.S. 241 (1967). Moreover, it is manifest that, at this late date, "to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings [will] itself effect the impermissible chilling of the very constitutional rights he seeks to protect." *Ibid.* at 252.

Nor does petitioner's equitable abstention argument stand up after this court's decisions in *Roe* and *Doe.* By distinguishing between the situation presented by the Texas doctor who was subject to a pending state prosecution and the Georgia doctor who was not and by upholding

challenges to the abortion laws of both states, the Court made clear that abstention was inappropriate in cases of this sort. Like the Georgia physician, the plaintiff doctors in the instant case are not subject to pending state prosecutions, and thus they clearly present a case where federal review is warranted.

CONCLUSION

For all the foregoing reasons, respondents respectfully pray that the writ of certiorari to review the decision to the United States District Court for the District of New Jersey sought in this matter be denied.

Respectfully submitted,

NADINE TAUB
175 University Avenue
Newark, New Jersey 07102

JANICE GOODMAN
BELLANY, BLANK, GOODMAN, KELLY,
ROSS & STANLEY
36 West 44th Street
New York, New York 10036

Attorneys for Respondents

Of Counsel:

PETER BUCHSBAUM
American Civil Liberties Union
of New Jersey
45 Academy Street
Newark, New Jersey 07102

APPENDIX

Complaint

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 264-70

Young Women's Christian Association of Princeton, New Jersey, Ann Krasnoff, New Jersey Branch of Women's International League for Peace and Freedom, Anne Ivey, Marilyn Ressler, Esther S. Frankel, Michael A. Tricarico, M.D., Myra R. Zinke, M.D., Samuel Breslow, M.D., Jack L. Ward, M.D., Ellis J. Mischel, M.D., Sherwin H. Raymond, M.D., and Ralph Dean Cavalli, M.D.,

Plaintiffs,

—vs.—

George F. Kugler, Jr., Attorney General of the State of New Jersey,

Defendant.

I. Jurisdiction

1. This is an action to redress the deprivation, under color of state law, of rights guaranteed to the plaintiffs by the Constitution and of the United States, specifically the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution. The jurisdiction of the Court arises under 28 U.S.C. 1331, 1343, 2201, 2202, 2281, and 2284, and 42 U.S.C. 1983.

2. Plaintiffs seek a declaration that the New Jersey statutes prohibiting the performance of abortions and pun-

ishing doctors, and thereby women, for conduct involving abortion, N.J.S. 2A:87-1, N.J.S. 45:9-16, are unconstitutional, and an injunction against the continued enforcement of said statutes. This is a proper case for the convening of a three judge federal court under 28 U.S.C. 2281, 2284.

II. Parties

3. The plaintiffs in this action are women and doctors of the State of New Jersey interested in the welfare and freedom of New Jersey citizens, personally, directly and adversely affected by the deprivation of rights caused by the present status of New Jersey's scheme of abortion regulations. The doctors and women are intimately affected by the New Jersey abortion statutes. Plaintiffs seek to make real their rights to freely associate with doctors and patients of their choice, to realistically cope with problems of the utmost privacy made grotesquely public by New Jersey's statutes, to live their lives under laws rational in their scope and effect, and to maintain the health and well being of themselves and their families.

4. Each of the doctors described below is a resident of the State of New Jersey, and a citizen of the United States. Each is hindered, deterred, chilled, threatened, and adversely affected by the actual or threatened enforcement of the above mentioned statutes, thereby preventing the full and complete exercise of rights guaranteed by the Constitution:

a. Plaintiff Michael A. Tricarico, whose home address is Box 377, Rocky Hill, New Jersey, was licensed to practice medicine in New Jersey in 1967. His offices are at 66 Mt. Lucas Road, Princeton, New Jersey. He is a member of the American Medical Association, the

Child Guidance Clinics of the United States, and the American Psychiatric Association. He teaches psychology at Trenton State College. During the course of his practice as a child and adolescent psychiatrist he turns away about two to four women per month who ask for and are in need of abortions because of their tender age, or depressed or psychotic state of mind. Because of the present structure of New Jersey's abortion regulation, Dr. Tricarico is unable to provide the medical help these women need.

b. Plaintiff Myra R. Zinke, whose home address is Box 367, Holmdel Road, Holmdel, New Jersey, was licensed to practice medicine in New Jersey in 1953. Her offices are in her home. She is a member of the American Society of Internal Medicine and the American Medical Women's Association. She teaches as an Assistant Clinical Professor at New Jersey College of Medicine. She is a fellow of the American College of Physicians. During the course of her practice in internal medicine she turns away about two to three women per year who ask for and are in need of abortions because of their lack of husbands. Because of the present structure of New Jersey's abortion regulation, Dr. Zinke is unable to provide the medical help these women need.

c. Plaintiff Samuel Breslow resides at 76 Market Street, Perth Amboy, New Jersey. He was licensed to practice medicine in New Jersey in 1932. His offices are at 511 New Brunswick Avenue, Perth Amboy, New Jersey. He is a member of the medical staff, Perth Amboy General Hospital. He is presently an attending

physician there as well as the physician in charge of the out-patient clinics. He was the director of the department of obstetrics and gynecology 1961-63.

He served as president of Perth Amboy General Hospital's medical staff for the years 1966 through 1968. He had also been the medical staff's treasurer and vice president, and a member of its joint conference and planning and development committee.

He is now a member of the Middlesex County Mental Health Advisory Committee and the Paramedical Education Advisory Committee of Middlesex County Community College.

Dr. Breslow is a well-known speaker on current changes in health care. In 1968 he appeared before the United States Senate Committee on Small Business, headed by Senator Gaylord Nelson, to testify concerning multiphasic screening. He also appeared before the New Jersey Legislature's joint Senate-Assembly Committee hearing on Family Planning, and before the New Jersey Commission on Reform of the Abortion Law. He is a member of the State Medicaid Committee on Family Planning, and is Chairman of the Community Services, Middlesex County Medical Society. He is a member of the International College of Surgeons, the Royal Society for Health, London, England, the American College of Obstetrics and Gynecology, the American College of Surgeons, the American College of Abdominal Surgeons, the American Medical Association, the New Jersey Medical Society, the New Jersey State Obstetrical and Gynecological Society, the Middlesex County Medical Society, the New York Academy of Science, and the Raritan Bay Academy of Medicine (Past President). He is also a contributor to the Journal of

Obstetrics and Gynecology and Modern Medicine. He is a member of the American Legion, BPOE, Elks, and Congregation Beth Mordecai, Perth Amboy.

During the course of his practice of obstetrics and gynecology, he turns away about ten to thirty women per month who ask for and are in need of abortions. Because of the present structure of New Jersey's abortion regulation, Dr. Breslow is unable to provide the medical help these women need.

d. Plaintiff Jack L. Ward, resides at 2631 Pennington Road, Pennington, New Jersey. He was licensed to practice medicine in New Jersey in 1957. His offices are at 435 Bellevue Avenue, Trenton, New Jersey. He is a member of the Mercer County Component Medical Society, the New Jersey Medical Society, the American Medical Association, the New Jersey Neuro-Psychiatric Association, the American Society of Group Psychotherapy and Psychodrama. He is a fellow and Past President of the American Society of Group Psychotherapy and Psychodrama. During the course of his psychiatric practice he turns away about ten persons per year who ask for and are in need of abortions because of their already large families or their highly depressed state of mind. Because of the present state of the New Jersey abortion regulation scheme, Dr. Ward is unable to provide the medical help these women need.

e. Plaintiff Jane N. Spragg resides at 234 Dudley Avenue, Westfield, New Jersey. She was licensed to practice medicine in New Jersey in 1953. She is a member of Planned Parenthood Physicians, American Association of Sex Educators and Counselors, New Jersey Public Health Association, Westfield Medical Society, and the New Jersey

Committee on Abortion. During the course of her practice in a planned parenthood clinic, she turns away about twelve persons per month who ask for and are in need of abortions because of a desire to limit the size of their families. Because of the present structure of New Jersey's abortion regulation scheme, Dr. Spragg is unable to provide the medical help these women need.

f. Plaintiff David M. Atkin resides at 153 Parkside Drive, Princeton, New Jersey. He was licensed to practice medicine in New Jersey in 1964. He is a member of the American Academy of Pediatrics, was a Diplomate to the American Board of Pediatrics in 1965 and is an Instructor of Pediatrics at Columbia-Presbyterian Hospital. He has published articles in the Journal of the Academy of Pediatrics. During the course of his practice in pediatrics he turns away two to three persons per year who ask for and are in need of abortions because of their unmarried state. Because of the present New Jersey abortion laws, Dr. Atkin is unable to provide these persons with the medical help they need.

g. Plaintiff Ellis J. Mischel resides at 181 Summit Avenue, Summit, New Jersey. He was licensed to practice medicine in New Jersey in 1955. He is a member of the American Academy of Psychoanalysis, and he has published articles in the Journal of the American Psychiatric Association on group therapy. He is a Diplomate of the American Board of Psychiatry and a fellow of the American Psychiatric Association. During the course of his practice in psychiatry, he turns away about two to three persons per month who ask for and are in need of abortions because they are unmarried. Because of the present struc-

ture of New Jersey's abortion laws. He is unable to provide the medical help these patients need.

h. Plaintiff Sherwin H. Raymond resides in Ridgefield, New Jersey. He was licensed to practice medicine in New Jersey in 1956. He was in the U. S. Army Medical Corps in 1951-1953. He has been on the medical staff of Holy Name Hospital in Teaneck, New Jersey, St. Mary's Hospital in Hoboken, New Jersey, North Hudson Hospital, Weehawken, New Jersey, and Margaret Hague Hospital, Jersey City, New Jersey. He has held membership in the American Medical Association, and the Bergen County Medical Society, has been a Diplomate of the National Board of Medical Examiners and a member of the American Society of Abdominal Surgeons. He has been arrested several times and charged with violations of N.J.S.A. 2A: 87-1, and has been convicted of violating said statute. Dr. Raymond's license to practice medicine in New Jersey has been revoked under N.J.S.A. 45:9-16.

i. Plaintiff Ralph Dean Cavalli resides at 207 Broadway, Camden, New Jersey. He was licensed to practice medicine in New Jersey in 1940. He has held membership in the American Medical Association, the New Jersey Medical Society, and the Camden Medical Society. He has been arrested several times for violating N.J.S. 2A:87-1 and is now in the custody of the Department of Institutions and Agencies of the State of New Jersey because of a conviction under said statute. His license to practice medicine has been revoked under N.J.S. 45:9-16.

5. Plaintiffs Anne Ivey, who resides at 10 Birchwood Court, Princeton Junction, New Jersey, Marilyn Ressler, who resides at Grandview Road, Skillman, New Jersey,

and Esther S. Frankel, who resides at 455 East 42nd Street, Paterson, New Jersey, sue on their own behalves and on the behalf of the membership of the New Jersey Branch of the Women's International League for Peace and Freedom, an unincorporated association of New Jersey women. Anne Ivey is President, Marilyn Ressler is Treasurer, and Esther S. Frankel is Secretary, of the Women's International League for Peace and Freedom of New Jersey. The New Jersey section of the International League is part of an international organization of the same name founded by Jane Addams in 1915 to seek peace and freedom for all people of the world. As part of their program the U. S. section of the Women's International League for Peace and Freedom believes that American women have the right to decide whether or not they will bear children; and that abortion is a medical and not a legal matter. The New Jersey affiliate to the International League has specifically urged the repeal of New Jersey's abortion laws and is now pursuing this case in its continuing effort to make real the medical and civil freedoms guaranteed to all by the Constitution.

6. Plaintiff Ann Krasnoff sues on behalf of herself and on behalf of the Young Women's Christian Association of Princeton, New Jersey, on whose Board she sits. The Young Women's Christian Association of Princeton has a diverse membership of women concerned about the rights of women in American society. The membership has been active in its opposition to New Jersey's abortion laws, and has been vocal in its desire to allow abortions to be medically handled in a private way between doctor and patient. The Association participates in this litigation in furtherance of its view that New Jersey abortion laws deprive

women of the fundamental right to privacy and medical care.

7. Defendant George F. Kugler, Jr., is the Attorney General of New Jersey, and is clothed with the duty of enforcing the statutes here in question.

III. Facts

8. N.J.S. 2A:87-1, provides that

> Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.
>
> If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5000, or by imprisonment for not more than 15 years, or both.

9. N.J.S. 45:9-16 provides that

> The board [New Jersey State Medical Board] may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery or chiropractic filed in the office of any county clerk in this State under any act of the legislature, upon proof to the satisfaction of the board that the holder of such license . . . (c) has practised criminal abortion, or been convicted of the crime of criminal abortion. . . . Before any license or registration, or chiropractic filed in the office of any county

> clerk of this State under any act of the Legislature, shall be suspended or revoked, except in the case of convictions of criminal abortions . . . the accused person shall be furnished with a copy of the complaint and be given a hearing before said board in person or by attorney. . . .

10. N.J.S. 2A:87-1 does not elaborate its applicability or lack of same to the common situations in which a patient seeks an abortion such as psychiatric indications, cardiac complications, kidney disease, rape, German measles, contraceptive failure, genetic complications, gastrointestinal diseases, neurologic diseases, diabetes, pulmonary diseases, cancer, exposure to radiation, and socio-economic conditions such as those encountered by parents who have neither the means nor the desire to have children.

11. Not only does N.J.S. 2A:87-1 not carefully elaborate the scope of its application, but the legal authorities of the State of New Jersey have given the statute variable interpretations over time, leading inevitably to uncertainty in the ranks of the medical profession and among the state's women. On or about June 23, 1967, then Attorney General Sills issued a press release announcing the results of a meeting of county prosecutors of the State of New Jersey which endorsed a report of a Committee on Abortion Law Study (See Appendix). The report indicated that the county prosecutors would not prosecute doctors performing abortions in which a doctor had made a good faith medical decision that an abortion was medically indicated. Prosecutor Edward J. Dolan of Middlesex County dissented from the report.

12. Prior to Edward J. Dolan's dissent from the report of the prosecutor's committee, Plaintiff Breslow and others were performing abortions in the hospitals of Middlesex County. Since notice of Edward Dolan's dissent was conveyed publicly and privately to plaintiff Breslow and others such abortions are no longer being performed by plaintiff Breslow and others in the hospitals of Middlesex County.

13. The scope and coverage of N.J.S. 2A:87-1 has been made extremely broad by the decisions of the courts of the State of New Jersey. The statute has been construed to make it a crime for anyone to advise someone where an abortion may be obtained, *State* v. *Wilson,* 79 N.J.L. 241 (1910); *State* v. *Weiss,* 130 N.J.L. 140 (1943); *State* v. *Ellrich,* 10 N.J. 146; to perform an act of abortion whether or not it is successful, *State* v. *Ellrich,* supra; *State* v. *Sutrchio,* 131 N.J.L. 256 (1944); *State* v. *Novak,* 22 N.J. 231; and to conspire to commit an abortion even though there is nothing to abort, *State* v. *Moretti,* 52 N.J. 182 (1968). The result is that the abortion itself is not the illegal act, for nothing need be aborted in order for there to be an offense. Plaintiff Raymond has been found guilty of violating N.J.S. 2A:87-1, though no one has ever proved that he has committed an abortion.

Furthermore, in *State* v. *Moretti,* supra, the Supreme Court of New Jersey, in an attempt to avoid a vagueness challenge to N.J.S. 2A:87-1 said that the phrase "maliciously or without lawful justification" may be construed to mean that the life of the mother was in danger. Said construction is not an exclusive one. The prosecutors of the state of New Jersey have not indicated that their prosecuting policy has been changed by *Moretti.* The

people of the State of New Jersey are in complete confusion.

14. Plaintiffs Tricarico, Zinke, Breslow, Ward, Spragg, Atkin, and Mischel, are asked by women in many different circumstances to perform abortions in the course of their medical practices. The plaintiffs must in each case decide whether and how he can advise and treat these patients in light of their overall physical and mental condition, and of their other personal needs. The medical problems presented to the plaintiffs have included in the past, and are likely to include in the near future:

a) Serious danger of death to the woman unless an abortion is performed;

b) Serious danger of suicide

c) Possible danger of suicide

d) Uncertain danger of suicide

e) Pregnancy caused by forceful rape, incest, statutory rape,

f) Pregnancy concurrent with diseases, including German measles, which might result in abnormal children;

g) Pregnancy when the patient would prefer to postpone childbearing until a later date, including situations involving contraceptive failure, youth of the female, poverty or other reasons.

The aforementioned plaintiffs and other doctors are not able to discern with any degree of clarity in which of the above situations they may legally perform an abortion, or

solicit others to perform an abortion. Proper medical care of their patients is effectively curtailed because of the abortion laws.

15. Plaintiffs Raymond and Cavalli have both been convicted of violating N.J.S. 2A:87-1 or conspiring to violate the same statute. Plaintiffs Raymond and Cavelli have had their licenses to practice medicine in the State of New Jersey revoked. Plaintiff Raymond's license was revoked without a hearing, confrontation of witnesses or other basic processes recognized as necessary for the conduct of an impartial proceeding.

16. A therapeutic abortion performed under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous to a woman, and many result in death, maiming, sterility, or serious infection. Experts estimate that from 300,000 to one million extra-clinical abortions are performed within the United States each year, hundreds resulting in death, thousands in serious infection. Experts further estimate that fewer than ten thousand abortions are performed within hospitals each year in the United States. The threat and uncertainty of statutory provisions such as those in New Jersey are the principal deterrent to physicians and patients who desire to perform or have clinical abortions. The plaintiffs as doctors or as women are unable to pursue normal medical practices because of the uncertainty, sweep, and application of the challenged statutes.

IV. Cause of Action

17. N.J.S. 2A:87-1 is unconstitutionally vague and uncertain on its face and as construed in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution.

18. N.J.S. 2A:87-1 and 45:9-16 on their face and as applied, deprive doctor-plaintiffs and their patients of the right to privacy in their physician-patient relationships, as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

19. Said statutes, on their face and as applied, deprive doctor-plaintiffs of the right to practice medicine according to the highest standards of medical practice, as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

20. Said statutes, on their face and as applied, deprive female plaintiffs and other women of "[t]he fundamental right of [a] woman to choose whether to bear children . . . " *People* v. *Belous,* 458 P. 2d 194, 80 Cal. Rep. 354 (1969) as protected by the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

21. Said statutes, as applied and on their face, infringe upon female plaintiffs and other women's right to life [which] is involved because childbirth involves risks of death," *People* v. *Belous,* supra, in violation of the Fourteenth Amendment to the United States Constitution.

22. Said statutes, on their face and as applied, infringe upon female plaintiffs and other women's rights to safe and adequate medical advice and treatment pertaining to the

decision of whether to carry a given pregnancy to term, in violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

23. Said statutes, on their face and as applied, infringe upon the stated constitutional rights of all of the plaintiffs because said rights are protected and fundamental, and no compelling or overriding justification can be offered for the potentially drastic sweep of the statutes.

24. Said statutes, on their face, and as applied, deprive all of the plaintiffs of the equal protection of the laws, by treating similarly situated classes differently with no compelling justification for classification.

25. Said statutes, on their face and as applied, violate the First Amendment free speech guarantee in their broad and indiscriminate sweep which deters and chills discussion and advice pertaining to abortion, and the Fourteenth Amendment in their broad and indiscriminate sweep which is unrelated to any legitimate state medical or regulatory needs.

26. Said statutes violate the Eighth Amendment in that they operate to impose a cruel and unusual punishment upon women by forcing them to bear each child they conceive.

27. The implementation of said statutes places the physician in a position of decision-making beset with such inherent possibility of bias and conflict of interest as to deprive all of the plaintiffs of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

28. N.J.S. 45:9-16 deprives Plaintiffs Raymond and Cavalli of rights guaranteed to them by the Fourteenth Amendment to the United States Constitution in that said statute

a) Causes the revocation of medical licenses without rights to a hearing and other basic rights guaranteed by the due process clause;

b) Mandates the revocation of a medical license on the basis of an unconstitutional statute, thereby depriving plaintiffs of their rights to practice medicine with the highest regard for the health of their patients.

c) Mandates the revocation of a medical license on the basis of a statute which is unconstitutional for the reasons stated in paragraphs 17 to 27.

IV. Relief

29. Plaintiffs request that a three judge court be convened immediately to hear this case.

30. Plaintiffs request that a declaratory judgment be issued holding that N.J.S. 2A:87-1 and N.J.S. 45:9-16 are unconstitutional.

31. Plaintiffs request that an injunction issue against the enforcement of N.J.S. 2A:87-1 and N.J.S. 45:9-16 against any of the plaintiffs in this action.

32. Plaintiffs Raymond and Cavalli request an order expunging their criminal records resulting from convictions under the above statute, and an order requiring the

return of their licenses to practice medicine in the State of New Jersey.

Respectfully submitted,

ROY LUCAS, Esq.
The James Madison Constitutional Law Institute
26 W. 9th Street
New York, N. Y. 10011
(212) 475-0590

RICHARD CHUSED, Esq.
Rutgers Law School
180 University Avenue
Newark, New Jersey 07102

RICHARD I. SAMUEL, Esq.
534 E. Broad Street
Westfield, New Jersey 07090

RUTH RUSSELL GRAY, Esq.
517 Central Avenue
Plainfield, New Jersey 07060

FLORENCE PESKOE, Esq.
Rutgers University, School of Law
180 University Avenue
Newark, New Jersey 07102

STEPHEN M. NAGLER, Esq.
of the New York Bar
American Civil Liberties Union of New Jersey
45 Academy Street
Newark, New Jersey 07102

Of Counsel:

ELEANOR HOLMES NORTON, Esq.
of the New York Bar
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

APPENDIX

Report of the Prosecutors' Committee Concerning the Validity and Enforceability of 2A:87-1 (Abortion Law)

The committee was composed of the following: Brendan Byrne, Prosecutor, Essex County, Chairman; Robert Frederick, Prosecutor, Warren County; Joseph Hoffman, Assistant Attorney General in charge of criminal investigations; Leo Kaplowitz, Prosecutor, Union County; Frank Scerbo, Prosecutor, Morris County.

The report of the aforementioned committee is as follows: it is not the function of this committee to make a judgment as to the morality of abortions or the termination of a pregnancy. It is the purpose of the Prosecutor to enforce the criminal laws of the State of New Jersey as enacted by the Legislature. And in serving this function it becomes necessary for the Prosecutor to interpret the criminal laws in accordance with the language used by the Legislature and the applications made with respect thereto by decisional law. In the first instance we deem it to be the obligation of a Prosecutor to uphold a law enacted by the Legislature unless that law has previously been declared invalid by a court of competent jurisdiction.

Premised upon the aforegoing, it is our opinion that N.J.S. 2A:87-1 which makes it a high misdemeanor for any person who "maliciously or without lawful justification" causes or procures the miscarriage of a pregnant woman is constitutional. This statute has never been ruled unconstitutional by the State courts which have considered it on at least two separate occasions, *Gleitman* v. *Cosgrove*, 49 N.J. 22 (1967); *State* v. *Brandenburg*, 137 N.J.L. 124 (S. Ct. 1948). It is therefore clear that the presumption of

constitutionality attaches to the statute, *Fried* v. *Kerrick*, 34 N.J. 68, 74 (1961); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N.J. 199 (1960); *In re Loch Arbour*, 25 N.J. 258, 264 (1957), and its presumed validity must be accepted by each and every law enforcement authority.

It is the considered opinion of this committee that the salient legal question presented by this statute is whether the words "without lawful justification" are capable of judicial definition within the framework of the cited statute.

The courts of this State have in the past been able to apply a given set of facts to this particular terminology. The committee points to the cases of *State* v. *Shapiro*, 87 N.J.L. 319 (E. & A. 1916), *State* v. *Brandenburg*, 137 N.J.L. 124 (S. Ct. 1948), and the recent case of *Gleitman* v. *Cosgrove*, 49 N.J. 22 (1967). While the committee has not explored in depth other variations of the usage of similar language in other statutes it points to the following cases as being illustrative of the ability of the court to define the terminology used in the cited statute. *Cf. State* v. *Hudson County News Co.*, 35 N.J. 284 (1961), *Grove Press Inc.* v. *Calissi*, 208 F. Supp. 580 (U.S.D.C. 1962), *Sanitary Vendors, Inc.* v. *Byrne*, 40 N.J. 157 (1963); and also see N.J.S. 2A:115-2, N.J.S.A. 18:13-11.

The aforementioned cited cases of *Shapiro*, *Brandenburg*, and *Gleitman* are illustrative of the ability of a court to define the words "without lawful justification" and, in the aforementioned cases of Shapiro and Brandenburg, the respective courts held to be "lawful justification" where the end result was the preservation of the mother's life. Additionally, in the recent Gleitman case, Justice Proctor had the following to say with respect thereto:

> "It may well be that when a physician performs an abortion because of a good faith determination in ac-

cordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime." See § 207.11 *Model Penal Code,* comment 4, 153-154 (*Tent. Draft No. 9* 1959), and *cf. Sanitary Vendors, Inc.* v. *Byrne,* 40 N.J. 157 (1963).

The committee therefore concludes that N.J.S. 2A:87-1 is capable of constitutional interpretation and, in fact, has been interpreted by the courts of our State. The committee further concludes that because of uncertainty which has arisen with respect to various factual situations the public is entitled to notice as to those circumstances which would subject a person to criminal prosecution under the abortion statute.

The committee very forcefully emphasizes that none of the situations, where it deals with the problems of "lawful justification," is one which is of the nature of the so-called "abortion mill", or "the backroom abortion".

The committee therefore recommends that N.J.S. 2A: 87-1 be interpreted to mean that a person is subject to criminal prosecution for causing or procuring an abortion except in those instances where such a technique is necessary for the preservation of the mother's life, or where a physician performs an abortion on the basis of a good faith determination which is made in accordance with the accepted medical standards that such an operation is medically indicated.

/s/ Brenden T. Byrne

/s/ Joseph A. Hoffman

/s/ Robert Frederick

/s/ Leo Kaplowitz

/s/ Frank Scerbo

Transcript, Hearing on Plaintiffs' Motion to Enter Judgment, *Y.W.C.A.* v. *Kugler*, Civ. No. 264-70 and Civ. No. 431-70, April 7, 1972, pages 25-31

* * * * *

—25—

constitutional rights which are set forth in your opinion and the Attorney General is going to stand by his position of not being sure that he has to listen to your opinion, there is going to be a collision, and the question is where it is going to come and how, but it is going to come. I don't think there is much way of avoiding it, based on the position that has been taken.

Judge Forman: You think what you allege in these papers already amounts to bad faith on the part of the Attorney General; because you agree that bad faith is an essential element in any application of this sort.

Mr. Samuel: Yes.

Judge Forman: All right. That is it.

Mr. Evenchick: Your Honor, until approximately a week ago when I happened to have read in a newspaper about one Dr. Livingston, I had not heard of him. I don't know him. I have no knowledge of his activities beyond what I read in the newspaper that was attributed to him.

In any event, what I believe is occurring here is an effort by the plaintiffs, or at least an effort by Dr. Livingston to bait the State into doing just what this Court indi-

—26—

cated in its opinion it doubted the State or did not believe the State would do and what the State through the Attorney General indicated it has no intention of doing, and that is acting in bad faith.

For a doctor to hold a press conference and make certain statements in this particular instance, in my opinion, was deliberately designed to, as I indicate, bait the State into that kind of bad faith. This the State will not permit itself to be led into. As far as I know—and I represent to the Court there is no intention towards any, as it were, bad faith prosecutions.

Judge Garth: Any intention towards any prosecution?

Mr. Evenchick: Any prosecution whatsoever? There has been none that has arisen that I am aware of, and Dr. Livingston is not an exception to that.

Now, what Dr. Livingston may have done or was—

Judge Garth: Let me interrupt. Have you, or, I am sorry, has the Office of the Attorney General, as it has in the past when relevant circumstances have arisen in difficult context, has the Office of the Attorney General given instructions in any respect to any of the county prosecutors with respect to the presentation of information

—27—

for indictments against individuals such as Dr. Livingston who may have performed abortions since February 29, 1972?

Mr. Evenchick: The only instructions that have been given—well, the only statements and instructions that have been given are those, first the statement, the public statement of the Attorney General, which was issued shortly after this Court's opinion and a recommendation to the prosecutors that there be no, that pending prosecutions of doctors be held in abeyance, and those are the only instructions that have been given to my knowledge by the Attorney General.

If I may, so I am absolutely certain of what I am saying to the Court is accurate, I would like to return to counsel table for a moment.

My colleague, Deputy Attorney General Luciani, who is here with me today, agrees what I represented to the Court is accurate. The statement dated March 7, 1972 was made an appendix to my brief, and that represents the extent of any instructions or recommendations made to law enforcement officials. I believe that, indeed, there is no collision course at this moment between anyone and the State, and we ought not to create one, and that is what I am afraid Dr. Livingston is attempting to do. And if there is this delicate Federal-State balance that has been re-

ferred to, and indeed it is not a problem but it is a reality and one which will ultimately be resolved when this case is appealed, but that does not mean the mere fact this Court has spoken and that there may be conflicting opinions from the Supreme Court of New Jersey, it does not mean there is going to be a constitutional collision, and surely does not mean there is going to be any bad faith prosecution.

Judge Forman: All right.

Mr. Samuel: May I just add one further thing. I don't think Dr. Livingston is baiting anybody.

Judge Forman: Well, that doesn't need rebuttal. That is lawyer's rhetorical language, such as you yourself sometimes are guilty of.

Mr. Samuel: In the Attorney General's statement he said he did not think the Court intended to change anything. Two of the plaintiffs in this action were doctors who spent considerable amounts of time in jail. We think this Court did intend to change something.

Dr. Livingston performed two abortions, and the fact that such publicity was given to the fact that he announced that he performed two abortions indicated there was some question in people's minds as to whether or not in New

—29—

York, where they perform many more than two abortions a day, and you wouldn't get anyone to raise their eyebrows at somebody doing ten or fifteen a day, how many doctors are doing it; the fact about a fuss in New Jersey that two doctors are doing it indicates that doctors are chilled and deterred, and when the Deputy Attorney General in Bergen County says that we are going to present it before a Grand Jury, this is intended to intimidate, harass and chill.

Judge Garth: I would like to ask Mr. Evenchick one more question.

Do you have any views with respect to the procedural status of the plaintiffs of Dr. Livingston's application, first to intervene and, secondly, to be before a three-judge panel, as I guess he probably is? I didn't hear you address yourself to that.

Mr. Evenchick: I appreciate the opportunity to do so. I was about to request the opportunity of the Court. I realized I did not address myself to it.

On the question of intervention, I would heartedly oppose that application and point out to the Court if this individual is indeed a licensed, practicing physician of the State, as he purports to be, his rights in this matter are fully and amply protected by this Court's decision which, after all, is all about the rights of licensed, practicing phy-

—30—

sicians, and therefore at this late stage in this litigation there is no reason whatsoever for another licensed practic-

ing physician to be added to the list of those who are plaintiffs, and that is my position on the intervention aspect.

Insofar as this application to what I gather now from what Mr. Samuel said he is treating as his request as one made to a three-judge panel, to this three-judge panel, I really have nothing to add beyond what I have already said.

As to intervention, I have just received the papers he filed with this Court this morning, although I did have verbal notice he intended to make an ex parte application to a single judge of this panel. I believe that if there is to be an injunction, and really, I suppose, this order to show cause comes right down to an effort by plaintiffs now to get the injunction which this Court refused to issue.

It is my understanding of the Federal statute such injunction could come only from a three-judge Court.

Judge Barlow: It certainly couldn't come on an ex parte application.

Mr. Evenchick: I would agree with you, Judge Barlow.

—31—

Judge Garth: You say such injunction could only come from a three-judge Court. That is when it is allied with an application to declare a state statute unconstitutional. If we don't permit intervention, in effect the decision of this Court has been to declare the statute unconstitutional, so he is left, then, with just the one prong of what otherwise is normally a two-pronged attack, isn't that so?

Mr. Evenchick: Yes, your Honor.

Of course, there was in the pleadings in the plaintiffs' complaint request for injunctive relief, which was denied by this Court. I believe what plaintiffs seek to do now is to come back before you and say: your Honors opined there would be no bad faith. We believe there has been bad faith

since the time of your decision and therefore ask you to reconsider your decision as to the injunction. I believe that is what the application amounts to.

All I am saying to your Honors is that I am urging before your Honors there has been no bad faith. Nothing has happened since the time of your decision, or even before that, which would change the picture as it was when your Honors wrote the decision in this case and when—

Judge Garth: Are you saying, then, Mr. * * *

Letter Brief of Assistant Prosecutor Archibald Kreiger

(COPY)

PROSECUTOR OF CAMDEN COUNTY

June 15, 1973

Hon. William E. Peel, J.C.C.
Court House
Camden, N.J.

Re: STATE vs. WARREN H. SLOUGH
Ind. Nos. 447-65 & 448-65

PETITION FOR POST-CONVICTION RELIEF

Dear Judge Peel:

We have reviewed the brief of defendant-petitioner in this case in which the claim is made that our abortion statute is invalid, under the recent decisions of the Supreme Court of the United States, that he likewise would be entitled to the same immunity because he *assisted* a licensed physician at the time of the event, because the entire statute was stricken down.

We submit that this argument is untenable because the defendant was not a registered nurse or a practical nurse, who are the only persons qualified and who have been registered under our statute to perform any services in assisting a licensed physician in connection with any surgery or operation. N.J.S. 45:11-1, et seq.

This question as to assistants was not decided by the Supreme Court, and we believe that our statute is only in-

valid as to physicians and registered nurses and hence severable as to other persons.

As sentimental as the defendant's brief sounds by referring to him, that even though he was not a licensed physician who was assisting one, "it would be the height of absurdity to say that while the doctor who performed the abortion could not be punished, the assistant who worked under his direction may be jailed. Our jurisprudence cannot allow a man to be incarcerated for assisting in the performance of a lawful act," is not a valid argument under our statute as construed by our courts but is severable as to this defendant.

This argument would be a valid one if the "assistant" was a registered nurse or a practical nurse, but the fact remains that the defendant was neither, and his claim now as to assisting, in and by itself constitutes a violation of the act relating to our abortion act.

We submit that the defendant's argument claiming to be an assistant to a licensed physician to entitle him to the benefit of the invalidity of our statute as decided by the Supreme Court of the United States, has no application to this case, and consequently his petition for post-conviction relief should be dismissed.

Very truly yours,

ARCHIBALD KREIGER
Assistant Prosecutor

AK:jls

cc—Peter S. Buchsbaum, Esq.
45 Academy Street
Newark, N.J. 07102

Letter of Attorney General William F. Hyland to the United States Court of Appeals for the Third Circuit

(Emblem)

STATE OF NEW JERSEY
WILLIAM F. HYLAND
ATTORNEY GENERAL

February 15, 1974

Hon. Francis L. Van Dusen
U.S. Court of Appeals for the Third Circuit
2046 U.S. Court House
9th and Chestnut Streets
Philadelphia, Pennsylvania 19107

Hon. Arlin M. Adams
U.S. Court of Appeals for the Third Circuit
2046 U.S. Court House
9th and Chestnut Streets
Philadelphia, Pennsylvania 19107

Hon. Daniel H. Huyett, III
U.S. District Court Judge
3006 U.S. Court House
9th and Market Streets
Philadelphia, Pennsylvania 19107

Re: *Y.W.C.A. et al* v. *Kugler*—No. 73-1837

Honorable Sirs:

Pursuant to the Court's request on oral argument of the above entitled matter, herein submitted are the views of the Attorney General of New Jersey regarding the appli-

cation of the State's criminal abortion statute (N.J.S.A. 2A:87-1).

In the wake of the United States Supreme Court's decisions in *Roe* v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), this office has redefined the application of N.J.S.A. 2A:87-1 pursuant to the authority of N.J.S.A. 52:17B-97 *et seq.* The provision has been interpreted, in accordance with the decision in *State* v. *Haren,* 124 N.J. Super 475, 480, 307 A2d 644, 647 (L. Div. 1973), to apply only to lay persons not acting under the supervision of a duly licensed medical doctor. The particular codification of the aider and abettor concept within the statute is similarly limited in application. Therefore, physicians licensed to practice medicine in this State, and any lay person acting under the supervision of a licensed practitioner, are beyond the purview of the proscription. Interpreted in this manner, N.J.S.A. 2A:87-1 is constitutional as applied to lay persons.

It is hoped that the foregoing response satisfies your inquiry.

Respectfully,

/s/ William F. Hyland
William F. Hyland
Attorney General of New Jersey

WFH:AJL:cm

cc: Nadine Taub, Esq.